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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

INTERNATIONAL FIDELITY INSURANCE COMPANY,
a New Jersey Corporation,

Petitioner,

vs.

BOARD OF TRUSTEES OF OPERATING ENGINEERS
LOCAL 825 FUND SERVICE FACILITIES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Given that the Employee Retirement Income Security Act of 1974 ("ERISA") provides that only an employer can be liable for unpaid contributions to union pension and benefit funds, does ERISA preempt a State statute that, while not expressly referring to pension plans or pension funds, imposes liability for unpaid pension fund contributions on a party other than an employer?

LIST OF PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 LIST

In rendering the decision from which review is sought, the Supreme Court of New Jersey consolidated two actions that raised the identical issue on appeal (both of which were instituted by the same plaintiff). The parties to the proceeding below included respondent Board of Trustees of Operating Engineers Local 825 Fund Service Facilities; International Fidelity Insurance Company, the petitioner herein and the sole defendant in the above-captioned matter; and First Indemnity of America Company, a defendant in the companion case to this action (which is entitled *Board of Trustees of Operating Engineers Local 825 Fund Service Facilities v. L.B.S. Construction Co., Inc.*). Also appearing before the court below as *amici curiae* were The Surety Association of America, New Jersey State Carpenter Benefit Funds, Carpenter Local No. 6 Benefits Fund, Laborer Local Nos. 472 and 172 Welfare and Pension Funds, Teamsters Local 408 Pension and Welfare Funds, and Laborers Local Nos. 72, 156, 569, and 711 Welfare and Pension Funds.

Petitioner IFIC has no parent companies or non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTORY PRAYER

Petitioner International Fidelity Insurance Company ("IFIC") respectfully prays that a Writ of Certiorari issue to review the opinion of the Supreme Court of New Jersey entered in the above-entitled proceeding.

THE OPINIONS RENDERED BELOW

The decision of the Supreme Court of New Jersey is reported at *Board of Trustees of Operating Engineers Local 825 Fund Service Facilities v. International Fidelity Insurance Co.*, 148 N.J. 561, 691 A.2d 339 (1997), and is reprinted in the appendix hereto, pp. A-1–A-18, *infra*. The decision of the Appellate Division of the Superior Court of New Jersey in this matter is reported at 287 N.J. Super. 498, 671 A.2d 596 (App. Div. 1996), and is reprinted in the appendix hereto, pp. A-19–A-31, *infra*.

STATEMENT OF THE BASIS OF JURISDICTION

The opinion from which review is sought was entered on April 9, 1997. Petitioner respectfully seeks review of that opinion, pursuant to 28 U.S.C. § 1257(a), on the basis that such decision involves a question of whether a State statute is repugnant to the laws of the United States.

RELEVANT STATUTORY PROVISIONS

The statutes relevant to this matter are *N.J.S.A.* 2A:44-143 through 147, collectively entitled the "New Jersey Public Works Bond Act," are reprinted in the appendix hereto, pp. A-32–A-45, *infra.*[1]

STATEMENT OF THE CASE

On or about April 1, 1990, the International Union of Operating Engineers Local 825 Fund Service Facilities (the "Union") executed a Collective Bargaining Agreement (the "Agreement") with J. Gram Construction Co., Inc. ("Gram"). The Agreement required Gram to make contributions, on behalf of Union members whom it employed, to various pension, welfare, and benefit funds established pursuant to ERISA.

Beginning in March 1993, Gram hired Union members in connection with various public works construction projects throughout New Jersey. The New Jersey Public Works Bond Act (the "Bond Act"), *N.J.S.A.* 2A:44-143, et seq., requires contractors on public works construction projects to procure a surety bond guaranteeing both the performance of the work and the full payment for labor and materials supplied on such projects. *N.J.S.A.* 2A:44-143(a). The Bond Act also prescribes

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[1] Certain of the provisions of the New Jersey Public Works Bond Act were amended in 1996. Both the statutes in effect as of the date of IFIC's motion to dismiss, as well as the revised statutory provisions, are included in the appendix. The citations included herein refer to the pre-amendment statutory scheme, which was the legislation considered by the court below.

the conditions to be contained in the subject surety bond, and states that recovery under such a bond shall be subject to the conditions and provisions of the statute as if they were fully incorporated in the terms of the bond. *N.J.S.A.* 2A:44-147.

Gram obtained the statutorily-mandated surety bonds from petitioner IFIC. Those bonds did not expressly provide coverage for contributions due to the Union as a result of the employment of its members on the bonded projects; rather, they merely provided the coverage required by the Bond Act. Although IFIC also issues fringe benefit bonds, which guarantee the payment to labor unions of contributions due from employers of union workers, the Union did not require Gram to furnish benefit bonds and thereby protect its members' interest in receiving the appropriate contributions.

Respondent Board of Trustees of Operating Engineers Local 825 Fund Service Facilities (the "Trustees") administers the Union's ERISA funds. On January 18, 1994, the Trustees audited Gram and determined that Gram did not remit payment for certain contributions due to the Union's ERISA funds. After Gram failed to satisfy the outstanding payment obligations, the Trustees instituted a lawsuit against Gram and obtained a default judgment. Gram did not satisfy that judgment, and therefore the Trustees instituted the present litigation in an attempt to hold IFIC responsible under the surety bonds to make payment of all contributions that Gram failed to remit. Since the bonds provide only the coverage mandated by the Bond Act, in order to prevail the Trustees must establish that the Bond Act requires the surety to guarantee direct labor expense and also any outstanding contributions owed to labor union pension funds.

The Trustees instituted this litigation against IFIC by filing a Complaint in the Superior Court of New Jersey, Essex County, Law Division, on January 5, 1995. On or about March 17, 1995, IFIC filed a motion to dismiss the Complaint on the basis that the claims asserted by the Trustees were preempted by ERISA. The thrust of IFIC's motion was that the Bond Act, if applied in the manner suggested by the Trustees,

creates an alternative funding source for unpaid pension and benefit contributions that is supplemental to the exclusive remedy provided by ERISA with respect to the enforcement of such payment obligations (*i.e.*, ERISA provides that only an employer can be liable for unpaid pension and benefit contributions, yet the Bond Act would compel a surety to also be liable for those obligations). On May 12, 1995, the motion judge granted IFIC's motion and dismissed the Trustees' Complaint.

By Order dated February 20, 1996, the Appellate Division of the Superior Court of New Jersey reversed the Order dismissing the Trustees' claims, finding that those claims are not preempted by ERISA.

On April 9, 1997, the Supreme Court of New Jersey affirmed the decision of the Appellate Division and ordered the reinstatement of the Trustees' Complaint against IFIC. In rendering its opinion, the Supreme Court of New Jersey "acknowledge[d] the existence of . . . precedent finding preemption of actions by unions or benefit plans against sureties for payments to fringe benefit or wage funds." *Board of Trustees of Operating Engineers Local 825 Fund Service Facilities*, 148 N.J. at 572. Nonetheless, the court ignored the substantial authority from both the Federal Circuit Courts of Appeal and District Courts, as well as various State courts, wherein statutes like the Bond Act and analogous State laws that create a funding source for the collection of delinquent ERISA contributions have been held to be preempted. The court below held that the Bond Act is not preempted by ERISA, basing its erroneous conclusion on: (i) a misinterpretation of two recent decisions from this Court (*New York Conference Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), and *California Div. of Labor Standards Enforcement v. Dillingham Constr.*, N.A., Inc., ___ U.S. ___, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997)); (ii) the misapplication of two decisions that are readily distinguishable from the facts at issue here (*Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561 (2d Cir. 1995), and *Ragan v. Tri-County Excavating, Inc.*, 62 F.3d 501 (3d Cir. 1995));

and (iii) a decision to follow the reasoning of several wrongly-decided cases that upheld State statutes against an ERISA preemption challenge.

LEGAL ARGUMENT

POINT I

THIS HONORABLE COURT SHOULD GRANT CERTIORARI SINCE THE DECISION BELOW IS IN CONFLICT WITH DECISIONS FROM SEVERAL CIRCUIT COURTS OF APPEALS AND INVOLVES AN IMPORTANT FEDERAL QUESTION PERTAINING TO ERISA PREEMPTION.

A. Conflicting Authority Exists On The Issue Presented For Review.

Since its adoption in 1974, the preemption provision of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq., has spawned a great deal of litigation as courts throughout the country have attempted to elucidate upon the rather unhelpful language of the statute itself. This Court alone has issued no fewer than 16 decisions dealing with ERISA preemption, *see DeBuono v. NYSA-ILA Medical and Clinical Services Fund*, ___ U.S. ____, 117 S.Ct. 1747, 1749 n.1 (1997), and there are innumerable decisions on that subject emanating from the other Federal courts and the courts of the fifty States.

The specific issue presented in this matter -- whether ERISA preempts State laws that do not expressly refer to ERISA plans, but which in effect make a party other than an employer responsible for unpaid pension and benefit contributions -- has been the frequent topic of judicial opinions.[2] Those decisions address the issue in a variety of contexts, including public works bond laws (such as this case),

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[2] As its exclusive remedy for the collection of delinquent contributions, ERISA provides for a civil action by the pension fund trustee against the laborer's employer. *See* 29 U.S.C. § 1145.

mechanic's lien laws, and collection laws (*e.g.*, statutes making a contractor liable for the debts of its subcontractors, or statutes making large shareholders liable for the debts of a corporation). There is a split of authority among the courts that have addressed the issue, however, and hence a compelling need exists to have this Court issue a pronouncement for all other courts to follow.[3]

1. Numerous Cases Have Applied ERISA Preemption To Invalidate State Statutes That Create An Alternate Funding Source For Pension Contributions.

In a case presenting identical circumstances to this case, the Court of Appeals for the Ninth Circuit concluded that ERISA preemption was warranted. In *Puget Sound Electrical Workers Health and Welfare Trust Fund v. Leaf Corporation, Inc.*, 1991 WL 537068 (W.D. Wash. 1991) (reprinted in the appendix hereto, pp. A-46–A-58, *infra*), *aff'd*, 5 F.3d 539 (9th Cir. 1993), the plaintiffs were employee trust funds that had sued a general contractor, subcontractor, and surety to collect delinquent trust fund payments. Upon review of the State public works bond statute, which was substantively analogous to the Bond Act, the District Court found that the statute created a remedy on behalf of union laborers that "related to" a benefit plan:

> [T]his court cannot base its determination regarding preemption on whether the State statute explicitly

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[3] In 1994, Congress considered a bill that proposed an amendment to ERISA's preemption clause that would have exempted "any provision of State law to the extent that such provision provides for a mechanics' lien or other lien, bonding, or other security for the collection of delinquent contributions for a multiemployer plan." *See* S. Rep. 103-299 ("Limits on ERISA Preemption of Certain Sate Laws"), 103d Cong., 2d Sess. (1994). Passage of that legislation would have mooted the need for judicial determinations of the applicability of ERISA preemption to such statutes. Although the bill passed the House of Representatives, the amendment died in the Senate and hence the divergence in the case law on this issue has continued.

> refers to benefit plans. . . . Thus, if a State statute creates a substantive remedy that has been interpreted to "relate to" a benefit plan, the fact that the statute does not specifically mention pension plans will not enable plaintiffs to avoid preemption.

Leaf Corporation, Inc., 1991 WL 537068 at p. 5. The court proceeded to determine that the result of the State statute was to impermissibly extend the liability for unpaid contribution from the employer (the subcontractor), as intended by ERISA, to additional parties -- the contractor and the surety. *Id.* Accordingly, the court held that the trustees' State law claim against the surety was preempted and the action was therefore dismissed. The Court of Appeals for the Ninth Circuit summarily affirmed that determination.

The Ninth Circuit reached a similar result in *Trustees of the Electrical Workers Health and Welfare Trust v. Marjo Corp.*, 988 F.2d 865 (9th Cir. 1992), where a subcontractor underpaid ERISA benefits and thereafter filed for bankruptcy protection. The plaintiff benefit plans then sued the general contractor, relying upon a Nevada statute of neutral reference that made contractors liable for the indebtedness incurred by any subcontractor acting on behalf of the general contractor in providing labor, construction, or other work on the subject project (and which is therefore equivalent to the Bond Act in all material respects). *Marjo*, 988 F.2d at 866, n.1. The Ninth Circuit held that the Nevada statute was preempted by ERISA to the extent that the enforcement mechanisms of the statute supplement those provided by ERISA by expanding liability for employer contributions. *Marjo*, 988 F.2d at 866 and 867.

The Supreme Court of Washington also found in favor of preemption under analogous circumstances to the case at bar. In *Puget Sound Electrical Workers Health and Welfare Trust Fund v. Merit Company*, 870 P.2d 960 (Wash. 1994), the court applied the ERISA preemption analysis to a Washington statute that held general contractors liable for their subcontractor's unpaid contributions. The Washington statute was a statute of general applicability and did not expressly refer to

ERISA plans. *Merit Company*, 870 P.2d at 962. Nevertheless, the Supreme Court of Washington held that the statute was preempted because it created an entirely separate action against general contractors and thereby provided a mechanism for funding employee benefit plans not otherwise available pursuant to ERISA. *Merit Company*, 870 P.2d at 963–964.

Several decisions from the Courts of Appeals for the First Circuit, the Second Circuit, the Fifth Circuit, and the Ninth Circuit, each of which analyzes whether ERISA preempts State statutes that specifically create mechanics liens or surety bond obligations in favor of employee benefit funds, are also relevant to the issue framed by this petition. In all of those cases, the State statute at issue was preempted not only because it specifically mentioned ERISA plans, but also for the independent reason that such laws provide an alternative cause of action for the collection of ERISA contributions. Consequently, those decisions support the conclusion that preemption is warranted where a State statute of neutral reference requires the issuance of a surety bond to secure the payment of pension fund contributions. *See Williams v. Ashland Engineering Co., Inc.*, 45 F.3d 588 (1st Cir.) (Massachusetts statute requiring a general contractor working on a public project to furnish bond to secure payment of "any sums due trustees . . . for health and welfare benefits" held to be preempted since the statute specifically refers to ERISA-regulated employee benefit plans and provides the plans with "a special source of recovery for unpaid employer contributions"), *cert. denied*, ___ U.S. ____, 64 U.S.L.W. 3229, 3239 (1996); *Sturgis v. Herman Miller Inc.*, 943 F.2d 1127 (9th Cir. 1991) (California statute allowing mechanic's lien for unpaid contributions deemed preempted because it conferred to benefit plans a special right not provided by ERISA); *Iron Workers Pension Fund v. Terotechnology Corp.*, 891 F.2d 548 (5th Cir. 1990) (Louisiana statute allowing alternative method of enforcing collection of pension contributions was preempted because it created supplemental enforcement mechanism); *McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13 (1st Cir. 1991) (preemption of Massachusetts statute permitting benefit plan trustees to assert lien against real property in

order to secure and collect overdue benefit contributions), *cert. denied*, 504 U.S. 910 (1992); *Romney v. Lin*, 105 F.3d 806 (2d Cir. 1997) (State statute making corporation's ten largest shareholders liable for delinquent pension contributions held to be preempted on the grounds that it was contrary to the express provisions of ERISA and would afford ERISA plans operating in New York an additional method of civil enforcement that would not be universally enjoyed by ERISA plans throughout the country).

In addition, a number of lower Federal and State courts have held that State statutes which create an alternate source of funding for pension fund contributions must be preempted -- both where the statute at issue made specific reference to pension plans and where the statute was of neutral reference -- as they infringe upon two of the critical areas that Congress sought to reserve as the exclusive domain of the federal legislature (*i.e.*, the funding and enforcement of ERISA payment obligations). *See e.g.*, *Trustees of the Colorado Pipe Industry Insurance Fund v. Apache Plumbing/Constr. Corp.*, United States District Court for the District of Colorado, Civil Action No. 95-WY-1095-CB (unreported decision reprinted in the appendix hereto, pp. A-59–A-68) (claim by a union for unpaid employer contributions, made against a contractor's surety under a Colorado public works bond statute that did not make specific reference to ERISA plans, was preempted; as used by the union, the statute imposed ERISA liability upon parties not within ERISA's liability provision and thus affected the manner in which ERISA funds are collected and supplemented ERISA's enforcement provisions); *Blackburn v. Iversen*, 925 F. Supp. 118 (D. Conn. 1996) (invalidating Connecticut law making officers and directors liable for corporation's default in employee benefit plan payments); *Minnesota Chamber of Commerce & Indus. v. Hatch*, 672 F. Supp. 393 (D. Minn. 1987) (Minnesota statute requiring bonds for payment of employee health benefit preempted because it interfered with federal control over pension plan administration); *Plumbing Indus. Bd. v. L & L Masons, Inc.*, 927 F. Supp. 645 (S.D.N.Y. 1996) (invalidating section of New York Lien Law, in action against

contractor for subcontractor's default, on basis that statute created ERISA payment obligation and thus was preempted); *Carpenters Southern Cal. Administrative Corp. v. El Capitan Dev. Co.*, 53 Cal.3d 1041, 282 Cal. Rptr. 277, 811 P.2d 196 (preempting State law that created liens on real property in order to secure fringe benefit contributions because law provided special treatment for ERISA funds through a funding mechanism supplemental to ERISA), *cert. denied*, 502 U.S. 963 (1991); *Operating Engineers Pension Trust v. Insurance Co. of the West*, 35 Cal. App. 4th 59, 42 Cal. Rptr. 2d 1 (preempting third-party beneficiary claim against surety based on payment and performance bonds since cause of action supplemented ERISA remedies), *cert. denied*, __ U.S. __, 116 S.Ct. 569 (1995); *Carpenters Health and Welfare Trust Fund For California v. American Casualty Co. of Reading, Pa.*, 1995 WL 761274 (N.D. Cal. 1995) (preemption of State statute that required payment bond securing obligations due to employee benefit plans on basis that, even if no statutory reference was made to ERISA plans, the remedy provided was supplemental to the provisions of ERISA); *Laborers National Pension Fund v. Woodrow Wilson Const., Inc.*, 581 So.2d 387 (La. Ct. App. 1991) (Louisiana Public Works Bond Act held preempted, in action against surety company, because statute provided an alternative method to enforce a collection of contributions owed to plans by creating an party other than an employer who can be held liable therefor).

2. Other Cases Have, To The Contrary, Rejected The Preemption Argument And Enforced A State Statute That Created An Alternative Funding Source For ERISA Obligations.

In a factual scenario identical to this case, the Court of Appeals for the Second Circuit held that preemption would not apply to a State public works bond statute that made no specific reference to pension plans but which effectively required that surety companies be liable for unpaid payment obligations due to pension funds. *Blieler v. Christwood Contracting Co, Inc.*, 72 F.3d 13 (2d Cir. 1995). In *Blieler*, a union benefit fund trustee sought to collect unpaid benefit contributions,

pursuant to a Connecticut statute that is in relevant respects identical to the Bond Act, from a surety that had issued a bond securing payment for work on a public construction project. The Second Circuit concluded that the State statute was not preempted by ERISA, basing its decision on *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561 (2d Cir. 1995). In *Greenblatt,* the Second Circuit held that a common law contract claim on a surety bond was not preempted by ERISA since the claim neither related to an employee benefit plan nor conflicted with any enforcement provision specified in ERISA. Although *Greenblatt* did not involve the application of a State statute, and instead related to a completely voluntary contractual transaction between a surety company and its principal, the Second Circuit found that the reasoning articulated in *Greenblatt* was entirely applicable to a claim against a surety for unpaid pension contributions pursuant to statutorily-compelled bond.[4] *Blieler*, 72 F.3d at 16.

Similarly, in *Trustees for Michigan Laborers' Healthcare Fund v. Warranty Builders, Inc.*, 921 F. Supp. 471 (E.D. Mich. 1996), the court held that the plaintiff trust funds were entitled to collect unpaid fringe benefit contributions from the surety bond posted pursuant to the Michigan Public Works Act, a statute that the court described as one of general applicability designed to ensure full payment to the plan beneficiaries. In finding that the statute did not "relate to" or have a "connection with" an ERISA plan, the court stated:

> The Michigan Public Works Act treats contributions due to an ERISA fund exactly as all other forms of compensation due a laborer or furnisher of materials on a public construction project. The statute does

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[4] *See also Local 46 Metallic Lathers Union v. Trataros Construction, Inc.*, 920 F. Supp. 55 (S.D.N.Y. 1996), wherein the court analyzed Section 137(3) of the New York State Finance Law -- which requires that a payment bond be posted and makes no explicit reference to pension funds or ERISA -- and found that it was compelled by the decision in *Greenblatt* to hold that the statute does not trigger ERISA preemption.

> not interfere with nor require any administrative action of the Plans. It does not cause any additional expense to the Plans. To the extent that the statute operates to insure payment of contributions to the Plans, it is incidental to its primary objective; in this case, to compel contractors on a public works project to pay their laborers' full compensation either directly or through a bond secured as provided by law. This law does not affect an ERISA plan in any meaningful way.

Trustees for Michigan Laborers' Health Care Fund, 921 F. Supp. at 479.

The same preemption issue raised by this case was resolved in favor of the pension fund in *Seaboard Surety Co. v. Indiana State District Council of Laborers and HOD Carriers Health and Welfare Fund*, 645 N.E.2d 1121 (Ind. Ct. App. 1995). In that case, a subcontractor defaulted on its fringe benefit contribution obligations and the benefit plans then filed suit against the surety that had issued the payment and performance bonds on the subject public works project. *Seaboard Surety*, 645 N.E.2d at 1122–1123. The bonds were issued pursuant to the Indiana Public Works Act, which did not make specific reference to employee benefit plans. The Indiana Court of Appeals held that the State statute was not preempted by ERISA based on its conclusion that Congress did not intend for such laws to be barred by the federal legislation.

Preemption was also recently rejected, in a case involving an analogous statute and factual setting, by the Supreme Court of Hawaii. In *Hawaii Laborers' Trust Funds v. Maui Prince Hotel*, 918 P.2d 1143 (Hw. 1996), the court considered whether preemption applied to a State mechanic's lien statute that allowed a person furnishing labor for the improvement of real property to assert a lien on the property to secure the value of the labor. *Id.* at 490. When a subcontractor failed to make certain required trust fund contributions, the plaintiff union sued the subcontractor and obtained a default judgment.

The union then sought to enforce the judgment through a foreclosure action on the property encumbered by the statutory lien, which action the property owner claimed to be preempted by ERISA. *Id.* at 1146–1147. The court held that the mechanic's lien statute was not preempted by ERISA.

3. The Dichotomy That Exists In The Holding Of The Cases Cited Above Should Be Resolved By This Court.

The cases discussed above highlight the problem that has developed with respect to whether States can enact laws that, although not specifically referencing pension plans or pension benefits, have the effect of mandating that a party other than an employer be liable for unpaid ERISA contributions. In cases posing essentially the same legal issue and factual circumstances, the Court of Appeals for the Ninth Circuit and the Supreme Court of Washington have said that those statutes cannot withstand preemption analysis (a conclusion also supported by decisions from the First Circuit and the Fifth Circuit in decisions dealing with statutes that expressly referred to ERISA plans); however, the Court of Appeals for the Second Circuit, the Supreme Court of Hawaii, and the Supreme Court of New Jersey have found preemption to be inapplicable. Further confounding the situation is that other courts from around the country, including District Courts and lower State courts, are aligning themselves on both sides of the issue. Consequently, a pronouncement from this Court is necessary in order to resolve the conflict that has developed among the decisions that have addressed this issue.

In its decision below, the Supreme Court of New Jersey highlighted the need for a definitive determination of the question presented when it (i) "acknowledged the existence of other precedent finding preemption of actions by unions or union benefit plans against sureties for payments to fringe benefit or wage funds," 148 N.J. at 572, and (ii) stated that "there is thus a thin line between claims for payment to employee fringe benefit plans that are preempted by ERISA and those that are not." *Id.* at 574.

B. Resolution Of The Preemption Issue By This Court Would Serve Important Public Interests.

ERISA is a broad, wide-ranging statute that imposes participation, funding, and vesting requirements on qualified pension plans. *Shaw v. Delta Airlines*, 463 U.S. 85, 90–91 (1983). ERISA also sets various uniform standards for pension and welfare plans, including but not limited to regulations regarding reporting, disclosure, and fiduciary responsibilities. *Id.* Commenting upon the breadth of ERISA's preemption provision, this Court has stated that the "substantive and enforcement provisions [of ERISA] are intended to preempt the field for Federal regulation, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." *Pilot Life v. Dedeaux*, 481 U.S. 41, 46 (1987); *Shaw*, 463 U.S. at 99 (1983) (Congress sought to reserve to itself the "sole power to regulate" the field of employee benefit plans); *McMahon v. McDowell*, 794 F.2d 100, 106 (3d Cir.), *cert. denied*, 479 U.S. 971 (1986) (Congress intended to establish pension plan regulation as an exclusively federal domain). In fact, Congress rejected a limited preemption provision that would have barred only State laws relating to the specific subjects covered by ERISA. *Shaw*, 463 U.S. at 98.

As is made quite evident by the recent vintage of the cases that have addressed the ERISA preemption issue with respect to statutes like the Bond Act, litigation over the validity of those State laws has dramatically proliferated in the past few years. The disparate treatment which those State laws receive, however, has lead to results that are diametrically opposed to ERISA's goal of uniformity in the area of pension fund regulation -- including the quite prominent areas of funding and enforcement.

Given the situation of the existence of a significant (and growing) body of conflicting decisions on this issue, union laborers are not being treated uniformly in instances where their employers fail to make ERISA contributions on their behalf. In some States, a laborer's union can collect the

unpaid contributions from several potential sources other than the employer (depending upon the State statutes then in force); in other States, a union representing a similarly situated laborer is limited to pursuing an action against the laborer's employer because the State laws establishing alternative sources for collection have been preempted (or not enacted because of a belief that such laws would be preempted). That sort of situation is undoubtedly not the type of environment that Congress sought to foster when ERISA was conceived and implemented.

Pension plan regulation is a matter of paramount concern to a tremendously significant percentage of the citizens of this country, as is made evident by the sheer number of decisions rendered by this Court on ERISA issues. Furthermore, among the various sub-topics covered by ERISA, there can be no doubt that the collection of employer pension contributions is an area of heightened concern. Accordingly, there is a substantial public interest that would be served by resolving the issue of whether State statutes of neutral reference can compel a party other than an "employer" (as that term is defined in ERISA) to be responsible for pension contributions.

POINT II

THE DECISION OF THE SUPREME COURT OF NEW JERSEY, HOLDING THAT THE BOND ACT IS NOT REPUGNANT TO ERISA, IS ERRONEOUS.

The purpose of ERISA's preemption provision is to preserve the field of pension and benefit regulation as one of exclusively federal concern. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). As such, ERISA preemption is only intended to prevent State and local regulation of ERISA plans. *Pilot Life Ins. Co.*, 481 U.S. at 46 (1987). Where a State statute is at issue, the act of State that must be examined is the enactment and manner of enforcement of the legislation. Where the claim asserted is based upon common law tort or contract principles, the State action is the body of case law to be applied to the subject claim.

The Supreme Court of New Jersey relied extensively on the *Ragan* and *Greenblatt* decisions, wherein the Third Circuit and the Second Circuit respectively found preemption to be unwarranted. Both of those cases, however, involved private bonds that were issued voluntarily and covered unpaid employer contributions.[5] Thus, those cases are factually distinguishable from the case at bar in that (i) the IFIC bonds provided only the scope of coverage mandated by the Bond Act, and therefore can only be deemed to provide a guaranty of delinquent employer contributions if the New Jersey courts interpret the statute as requiring such coverage; and (ii) IFIC had no choice but to issue the bonds and provide the scope of coverage mandated by the statute (or withdraw from the surety bond business, since the vast majority of surety bonds are issued on public works projects).

In *Ragan*, the Third Circuit held that a union was not preempted from pursing surety bond claims for delinquent contributions where the subject bond was issued as part of a completely private and voluntary transaction. The court began its analysis by recognizing that unlike the statutory laws that are usually at issue in a preemption analysis, "common law causes of action are generally applicable laws that make no reference to, and indeed function irrespective of, the existence of an ERISA plan." *Ragan v. Tri-County Excavating, Inc.*, 62 F.3d at 511 (quotation omitted). Next, the court applied the *Ingersoll-Rand* test and held that the cause of action implicated Pennsylvania's common law of contract, which was sufficiently general in its application to avoid preemption:

> Here, the district court need only determine Hartford's obligations under the Bond. It need make no inquiry in to the validity or status of the funds (or indeed whether they are ERISA funds), nor need it

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[5] In *Greenblatt*, the bond at issue was denominated a "Fringe Benefits Bond," and in *Ragan* there was no contention that the bond at issue did not provide coverage for fringe benefits (the coverage dispute centered on whether the claim was timely filed).

> explore Hartford's motives regarding employee benefits. The fact that the claimant under the bond happens to be an ERISA fund is not the kind of "critical factor in establishing liability" that prompted preemption in Ingersoll-Rand.

Ragan, 62 F.3d at 511.

Similarly, in *Greenblatt* the Second Circuit had to determine whether the surety law of New York would be preempted. In that case, a surety that had voluntarily issued a private fringe benefits bond expressly guaranteeing payment of employer benefit contributions tried to avoid its payment obligations by asserting that the benefit fund's claims under the bond were preempted by ERISA. The bond was not issued by compulsion of State law; rather, the surety issued the bond in an arms-length voluntary transaction for the express purpose of guarantying the payment of pension benefits due to employees. Since the bond was not a statutory bond, the court considered the State common law applicable to surety obligations in its preemption analysis. After finding that body of law to be neutral in reference and application, the court concluded as follows:

> At most, some provision of State surety law might affect the collectibility of funds owed to a plan. A law having only such an indirect effect on plan assets is exactly the kind that *Blue Cross* and *Mackey* save from the preemptive sweep of § 514(a). A claim on a surety bond is but a run-of-the-mill State law claim, similar to tort or non-plan related contract actions to which ERISA plans may be a party. Although obviously affecting and involving ERISA plans surety bond claims are not preempted by § 514(a).

Greenblatt v. Delta Plumbing & Heating Corp., 68 F.3d 562, 574.

The Supreme Court of New Jersey found the differences between a privately issued bond and a bond issued pursuant to

the Bond Act to be immaterial. *Board of Trustees of Operating engineers Local 825 Fund Service Facilities*, 148 N.J. at 574. The court's decision in that regard, which led to its conclusion that *Ragan* and *Greenblatt* reflect a "change in emphasis" in the law and are persuasive in resolving this case, is the fatal flaw in the court's decision.[6] Where a State statute mandates the issuance of a bond that expressly or functionally guarantees payment of delinquent employer contributions, that statute must be preempted because the State is effectively expanding upon the ERISA provision limiting liability for those obligations to employers. In a private transaction wherein a surety issues a bond covering fringe benefits, however, it is not the State that creates the alternate funding source; that alternate source is the result of a private agreement between the surety, its principal, and the obligee. Hence, in a private transaction preemption will only apply if the common law applicable to the action to enforce the voluntary agreement is sufficiently "related to" ERISA. *See e.g., Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990).

The decision below is flawed for several additional reasons as well. First, the court placed undue emphasis on the neutrality of the language of the Bond Act and failed to properly account for the practical effect of the statute -- *i.e.*, that it

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[6] The court below also relied upon several lower court cases finding the doctrine of ERISA preemption to be inapplicable. Many of those decisions, however, were jurisdictionally compelled by the decisions in *Ragan*, *Greenblatt*, and *Blieler*. Hence, a determination that those cases are either not applicable to situations involving a statutory bond (*Ragan* and *Greenblatt*), or mistakenly decided based upon a failure to differentiate between instances where the surety bond is compelled by State statute and where there is no State involvement (*Blieler*), would eradicate much of the authority relied upon by the court below. *See e.g., Eacott v. Insurance Co. of North America*, 40 Conn. App. 777, 673 A.2d 587 (1996) (reversing finding of preemption by lower court based on *Blieler*); *Carpenters Local 261 Health & Welfare Fund v. National Union Fire Ins. Co.*, 686 A.2d 1373 (Pa. Commw. Ct. 1996) (holding no preemption in accord with *Ragan*); and *Local 46 Mettalic Lathers Union v. Trataros Constr., Inc.*, 920 F. Supp. 55 (S.D.N.Y. 1996) (court compelled to follow *Greenblatt* on preemption issue).

requires surety companies (which could not remain in business without issuing bonds on public works projects) to be liable for ERISA obligations. Second, the court was influenced by its determination that the Bond Act does not "undermine" ERISA; however, the ERISA preemption provision is so broad that even State laws that are consistent with the purposes of ERISA are preempted if they relate to ERISA plans in something other than a remote or tenuous way. *McMahon v. McDowell*, 794 F.2d 100, 106 (3d Cir.), *cert. denied*, 479 U.S. 971 (1986). Third, the court misconstrued two recent decisions of this Court and interpreted those cases as supporting a finding against preemption of the Bond Act. In fact, those cases involved State statutes that are materially different from the Bond Act and thus are not pertinent to the issue here. *See* Point III, *infra*. Finally, the Supreme Court of New Jersey determined to follow the incorrect and wrongly-decided line of cases finding no preemption in cases arising in the same or a similar context as this matter; the better-reasoned approach follows the decisions wherein the State statutes under review were preempted because they created an alternate funding source for ERISA contributions.

POINT III

THE SUPREME COURT OF NEW JERSEY MISCONSTRUED THE HOLDINGS OF TWO RECENT OPINIONS OF THE UNITED STATES SUPREME COURT.

The Supreme Court of New Jersey interpreted two recent decisions by this Court -- both of which declined to impose ERISA preemption upon the State statute at issue -- as signaling a "trend" in preemption analysis that favors a more liberal view of the type of State law that can withstand preemption scrutiny. Each of those cases, however, involved statutes that bore an extremely attenuated connection to the subject matter addressed by ERISA. The Bond Act, much to the contrary, squarely impacts upon one of ERISA's primary goals: the establishment of an exclusive and uniform framework of laws governing the funding and enforcement of

pension plan obligations. Hence, the authority from this Court relied upon by the Supreme Court of New Jersey is inapplicable to the preemption issue presented by the Bond Act.

One of the decisions of this Court that was emphasized by the court below is *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 695, 115 S.Ct. 1671 (1995), a case dealing with the issue of whether ERISA preempts State statutes requiring hospitals to levy surcharges to certain patients. In *Blue Cross*, the Court determined that the surcharge statutes impacted upon employee benefit plans in a very indirect manner and hence were not preempted. The Court stated:

> We acknowledge that a State law might produce such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers, and that such a State law might indeed be preempted under § 514. But as we have shown, New York's surcharges do not fall into either category; they affect only indirectly the relative prices of insurance policies, a result no different from myriad State laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate.

Blue Cross, 115 S.Ct. at 1683. Therefore, the Court rejected the preemption argument because the effect of the State statute on ERISA plans was perhaps one of the most tenuous and remote relationships possible. It is not insignificant, however, that the Court stated that:

> We do not hold today that ERISA preempts only direct regulation of ERISA plans, nor could we do that with fidelity to the views expressed in our prior opinions on the matter.

Id. That statement affirms the conclusion that statutes of general applicability or neutral reference are not necessarily beyond the scope of ERISA's preemptive reach.[7]

The other United States Supreme Court case mistakenly relied upon by the Supreme Court of New Jersey is *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, ___ U.S. ___, 117 S.Ct. 832 (1997), a case that involved a determination as to whether ERISA preempts California's prevailing wage statute. The statute under review required contractors on public works projects to pay "prevailing wages" to workers, the only permissible exception being for apprentices enrolled in State-approved apprenticeship programs (some such programs are considered to be ERISA plans). A subcontractor on a public works project used apprentices from an apprenticeship program that had not been

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[7] The decision in *New York State Conference of Blue Cross & Blue Shield* validated the decision of the Court of Appeals for the Third Circuit in *United Wire v. Morristown Memorial Hosp.*, 995 F.2d 1179 (3d Cir.), *cert. denied*, 114 S.Ct. 651 (1993). In *United Wire*, the court was dealing with a statute that established hospital billing rates which served to increase the charges billed to ERISA plan participants. On the basis of the increased costs, an employee benefit fund argued that the statute was preempted by ERISA. The court responded as follows:

> A preemption provision designed to prevent state interference with federal control of ERISA plans does not require the creation of a fully insulated legal world that excludes these plans from regulation of any purely local transaction. The purchase of hospital service is like the purchase of public utility service, or of any other service or commodity whose price is controlled by the State. . . . In short, if ERISA is held to invalidate every State action that may increase the cost of operating employee benefit plans, those plans will be permitted a charmed existence that never was contemplated by Congress. Where, as here, a State statute of general application doe snot effect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the statute has some economic impact on the plan does not require that the statute be invalidated.

United Wire, 995 F.2d at 1193-1194.

approved, yet paid the apprentices less than the prevailing wage. At the request of a labor union, a State enforcement agency sought to compel the general contractor and the subcontractor to make additional payments so that the apprentices would be paid the prevailing wage. *Id.* at 836.

This Court undertook to determine whether the prevailing wage rate statute "made reference to" or had "a connection with" ERISA plans such that the statute should be preempted. First, the Court held that the statute did not "make reference to" ERISA plans because approved apprenticeship programs need not necessarily be ERISA plans under the California statute. *Id.* at 838. The factor that determines whether a program qualifies as an ERISA plan is the manner in which it is funded and, since the California prevailing wage statute applies to apprenticeship programs regardless of whether the program is funded in a manner so as to render it an ERISA plan, the Court concluded that it did not "refer to" ERISA plans for preemption purposes. *Id.* at 839.

Second, the Court held that the California prevailing wage statute did not have "a connection with" ERISA plans because the only effect of the statute on ERISA plans was merely "to provide some measure of economic incentive to comport with the State's requirements [for approval of apprenticeship programs], at least to the extent that those programs seek to provide apprentices who can work on public works projects at a lower wage." *Id.* at 841. As such, the Court held that the effect of the California statue was too tenuous and remote to warrant ERISA preemption. *Id.* at 842. In its analysis of *California Division of Labor Standards Enforcement*, the Court equated the tangential effect of the California statute with the legislation under review in *Blue Cross*.

This case is quite distinguishable from the decisions in *California Division of Labor Standards Enforcement* and *Blue Cross*. Unlike the extremely tenuous relationship between the State statutes at issue in those cases and employee benefit plans, the Bond Act directly impacts upon two areas which Congress intended to be under exclusive federal

regulation and for which it enacted specific legislation: the funding and enforcement of ERISA plans. The law is well-established that when a State statute impacts upon those areas -- particularly by placing liability for unpaid employer contributions upon a third party who is not obligated under ERISA for making those payments -- the statute will be preempted regardless of whether it is a statute of general or specific application. Hence, the decisions in *Blue Cross* and *California Division of Labor Standards Enforcement* do not in any way support a finding of no preemption under the circumstances presented by this case.

CONCLUSION

For the reasons set forth above, petitioner International Fidelity Insurance Company respectfully requests that this Court grant this petition for a Writ of Certiorari to the Supreme Court of New Jersey.

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Dated: July 7, 1997

APPENDIX

Appendix

691 A.2d 339

BOARD OF TRUSTEES OF OPERATING ENGINEERS LOCAL 825 FUND SERVICE FACILITIES,

Plaintiff-Respondent,

v.

L.B.S. CONSTRUCTION CO., INC.; and "A" COMPANY; and "B" COMPANY, Fictitious Companies,

Defendants,

and

FIRST INDEMNITY OF AMERICA INSURANCE COMPANY, a Corporation,

Defendant-Appellant.

BOARD OF TRUSTEES OF OPERATING ENGINEERS LOCAL 825 FUND SERVICE FACILITIES,

Plaintiff-Respondent,

v.

INTERNATIONAL FIDELITY INSURANCE COMPANY, a Corporation,

Defendant-Appellant.

Argued January 6, 1997 — Decided April 9, 1997.

SYNOPSIS

Union benefits fund brought action against sureties to recover unpaid pension benefits from bonds issued under Public Works Bond Act. The Superior Court, Law Division, Essex County, granted summary judgment for sureties. Fund appealed. The Superior Court, Appellate Division, Dreier, P.J.A.D., 287 N.J.Super. 498, 671 A.2d 596, reversed and

remanded. Sureties petitioned for certification. After granting certification, the Supreme Court, O'Hern, J., held that Employee Retirement Income Security Act (ERISA) does not preempt suits by union trust funds against sureties that have issued bonds to employers for public works projects pursuant to Public Works Bond Act.

Affirmed.

Pensions — 105.1

ERISA does not preempt suits by union trust funds against sureties for contributions due funds from employers required to post bonds for public works projects under Public Works Bond Act. Employee Retirement Income Security Act of 1974, § 514(a), 29 U.S.C.A. § 1144(a); N.J.S.A. 2A:44-143, subd. a(1).

Thomas J. Demski, argued the cause for appellant International Fidelity Insurance Company (*Sills Cummis Zuckerman Radin Tischman Epstein & Gross*, attorneys; *Mr. Demski* and *Mark E. Duckstein*, on the briefs).

Joseph C. Glavin, Jr., argued the cause for appellant First Indemnity of America Insurance Company.

N. Janine Dickey, argued the cause for respondent Board of Trustees of Operating Engineers Local 825 Fund Service Facilities (A-72).

Albert G. Kroll, argued the cause for respondent Board of Trustees of Operating Engineers Local 825 Fund Service Facilities (A-73) (*Kroll & Heineman*, attorneys).

Lauretta A. Rush—Masuret, argued the cause for *amicus curiae* The Surety Association of America.

James R. Zazzali, argued the cause for *amici curiae* New Jersey State Carpenter Benefit Funds, Carpenter Local No. 6

Benefits Fund, Laborers Local Nos. 472 and 172 Welfare and Pension Funds, Teamsters Local 408 Pension and Welfare Funds, and Laborers Local Nos. 72, 156, 569 and 711 Welfare and Pension Funds (*Zazzali, Zazzali, Fagella & Nowak*, attorneys; *Mr. Zazzali* and *Kenneth I. Nowak*, on the letter briefs).

O'HERN, J.

These appeals concern the liability of a surety company to pay contributions into fringe benefit plans for employees on public works projects when the employer-principal defaults on its payments to the plans. The primary issue is whether federal employee benefit law preempts provisions of the New Jersey Public Works Bond Act, N.J.S.A. 2A:44-143 to 147 (Bond Act or Act) that require contractors to post bonds for payment for labor performed on public works projects.

We discuss the facts of each case separately before proceeding to an analysis of the common issues.

I

International Fidelity

Board of Trustees of Operating Engineers, Local 825, had a collective bargaining agreement with J. Gram Construction Co. that required Gram to make contributions, on behalf of the members of Local 825 whom it employed, to various pension, health, and welfare funds established pursuant to the federal Employee Retirement Income Security Act, 29 *U.S.C.* § 1001 to 1461 (ERISA). Local 825 administered the funds on behalf of its members.

Gram hired Local 825 members in connection with various public works projects in which Gram was engaged. Pursuant to the Bond Act, Gram procured surety bonds guaranteeing both performance of the work and the full payment for labor and materials supplied on the jobs. Gram obtained the necessary bonds from International Fidelity Insurance Co. (IFIC).

In January 1994, Local 825 audited Gram's books and discovered that Gram had not paid $95,612.53 in contributions

owed to the pension fund. The Local demanded payment by Gram of the past contributions. When Gram failed to pay, Local 825 began an action in the Law Division and obtained a default judgment against Gram for the amount owed. In January 1995, Local 825 began this action against IFIC, claiming that IFIC is responsible under the bonds IFIC issued on behalf of Gram to make all payments that Gram failed to make.

IFIC filed a motion to dismiss on the basis that ERISA preempts the Bond Act, and prevents a surety from being liable for a contractor's delinquent payment of fringe benefit contributions. The Law Division granted IFIC's motion and dismissed Local 825's complaint.

Local 825 appealed. The Appellate Division consolidated the case with the *First Indemnity* matter. It reversed the Law Division and reinstated Local 825's complaint. 287 *N.J.Super.* 498, 671 *A.*2d 596 (App.Div.1996). It reasoned that although the trial courts' opinions had been in accord with the weight of authority at the time they were issued, a new group of cases had been decided in the previous year that clarified the reach of ERISA preemption to sureties' liability under bonds issued to a contractor.

We granted IFIC's petition for certification. 146 *N.J.* 67, 679 *A.*2d 654 (1996).

First Indemnity

Local 825 had a collective bargaining agreement with L.B.S. Construction Co., Inc. (LBS) similar to that which it had with Gram. This collective bargaining agreement included various pension, benefit, and welfare funds established pursuant to ERISA, and required LBS to pay contributions to the various funds. Pursuant to the Bond Act, LBS obtained bonds for labor and materials from First Indemnity of America Insurance Co.

An audit by Local 825 of LBS' books revealed a $73,624.94 underpayment of contributions to the trust funds. In August 1992, Local 825 filed a complaint in the Law Division against LBS for payment of the delinquency. LBS did

not file an answer, apparently because it was involved in bankruptcy proceedings.

Local 825 filed an amended complaint in May 1993, and named First Indemnity as a defendant. Local 825 alleged First Indemnity was responsible for contribution to the trust funds because of LBS' default. First Indemnity moved for summary judgment on the grounds that ERISA preempted Local 825's cause of action. In July 1994, the Law Division granted First Indemnity's motion.

Local 825 appealed. The Appellate Division reversed the Law Division and reinstated Local 825's complaint on the same basis as in the *International Fidelity* matter. 287 *N.J.Super.* 498, 671 *A.*2d 596 (App.Div.1996).

We granted First Indemnity's petition for certification. 146 *N.J.* 68, 679 *A.*2d 654 (1996).

II

ERISA

A.

The United States Supreme Court has set forth the history and background of ERISA in several decisions. We provide a brief discussion here.

ERISA is a comprehensive regulatory scheme that Congress enacted after years of studying private employee benefit plans. *Nolan v. Otis Elevator Co.*, 102 *N.J.* 30, 38, 505 *A.*2d 580, *cert. denied*, 479 *U.S.* 820, 107 *S.Ct.* 84, 93 *L. Ed.*2d 38 (1986). Congress enacted ERISA in 1974 "to protect participants of employee benefit plans and their beneficiaries from the abuses which previously existed in many retirement plans." Note, *ERISA: Preemption of State Health Care Laws and Worker Well-Being*, 4 *U. Ill. L.F.* 825 (1981) (footnotes omitted). The statute imposes participation, funding, and vesting requirements on private employee benefit plans. Employee benefit plans include both pension plans and health and welfare plans. ERISA also sets various uniform standards,

including rules concerning reporting, disclosure, and fiduciary responsibility for the plans. In addition, the statute provides civil and criminal penalties. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 *U.S.* 359, 361 n. 1, 100 *S.Ct.* 1723, 1726 n. 1, 64 *L. Ed.*2d 354, 358 n. 1 (1980).

To guarantee uniformity in the enforcement of employee benefit plans, ERISA contains a sweeping preemption provision. ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered by ERISA]." 29 *U.S.C.* § 1144(a).

The leading case interpreting this provision is *Shaw v. Delta Air Lines, Inc.*, 463 *U.S.* 85, 103 *S.Ct.* 2890, 77 *L. Ed.*2d 490 (1983). In *Shaw*, the Court held that ERISA preempted certain sections of New York's antidiscrimination laws concerning pregnancy benefits. The Court stated that a "law 'relates to' an employee benefit plan . . . if it has a connection with or reference to such a plan." *Id.* at 96-97, 103 *S.Ct.* at 2900, 77 *L.Ed.*2d at 501. The Court further held that state laws covering subject matters beyond those covered by ERISA could also trigger preemption. *Id.* at 98, 103 *S.Ct.* at 2900, 77 *L.Ed.*2d at 501-02. *See also FMC Corp. v. Holliday*, 498 *U.S.* 52, 58, 111 *S.Ct.* 403, 407, 112 *L. Ed.*2d 356, 364 (1990) (stating ERISA preemption provision is "conspicuous for its breadth"). ERISA preempts state laws even when those laws are not specifically designed to affect ERISA-covered plans or affects them indirectly. *District of Columbia v. Greater Washington Bd. of Trade*, 506 *U.S.* 125, 113 *S.Ct.* 580, 121 *L. Ed.*2d 513 (1992).

We have addressed the preemptive effect of ERISA on New Jersey laws in several cases and, consistent with *Shaw*, have interpreted the preemption provision to give full effect to ERISA's purposes. In *Nolan, supra*, 102 *N.J.* 30, 505 *A.*2d 580, we held that ERISA preempted claims of age discrimination in an employee benefit plan when the employees brought actions under the New Jersey Law Against Discrimination (LAD) after the federal time requirement for such actions had not been met. The parties had agreed that the LAD

"related to" an employee benefit plan. The issue before the Court was whether the age-discrimination claim fell within an exception to ERISA preemption that prohibits preemption when enforcement would "impair" a law of the United States. 29 *U.S.C.* § 1144(d). *See Nolan, supra*, 102 *N.J.* at 39, 505 *A.*2d 580. Although acknowledging the strong state concern for ending age discrimination, we held that such concern must yield to the "paramount federal interest" in uniform administration of employee benefit plans expressed by ERISA and Supreme Court precedent. *Id.* at 48, 505 *A.*2d 580.

However, when a state law that may have the potential to interfere with ERISA is designed to address a unique local problem, and when Congress is willing to tolerate that potential interference, we have found state laws to survive ERISA preemption. In *Local 1804, Int'l Longshoremen's Ass'n v. Waterfront Comm'n*, 85 *N.J.* 606, 428 *A.*2d 1283 (1981), the Court held that a provision of the Waterfront Commission Act defining "convicted" for misconduct as effective upon a trial court judgment was not preempted by a similar ERISA provision that defined "convicted" as effective only after the exhaustion of all appeals. *Id.* at 616, 428 *A.*2d 1283. The Court stated that congressional recognition of New Jersey's interest in reducing waterfront crime did not conflict with the uniform protection of benefit plans. *Ibid.*

More recently, we have suggested that ERISA would not preempt state law regarding unfunded employee vacation benefits, because of the "illogic" of finding that Congress intended to preempt a state law without providing any correlative federal standards. *Erich v. GAF Corp.*, 110 *N.J.* 230, 237, 540 *A.*2d 518 (1988), *cert. denied*, 490 *U.S.* 1034, 109 *S.Ct.* 1930, 104 *L. Ed.*2d 402 (1989). *See also In re 1115 Legal Service Care*, 110 *N.J.* 344, 349 n. 2, 541 *A.*2d 673 (1988) (stating purpose to preempt state laws tangentially related to employee benefit plans cannot be found in ERISA).

The Appellate Division correctly perceived a trend in recent federal precedent that has qualified the broad language of *Shaw* and has limited ERISA preemption of generally

applicable state laws. 287 *N.J.Super.* at 507-08, 671 *A.*2d 596. This trend supports the reasoning of *Local 1804, supra*, 85 *N.J.* 606, 428 *A.*2d 1283, and *Erich, supra*, 110 *N.J.* 230, 540 *A.*2d 518.

The major case elaborating this trend is *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 *U.S.* 645, 115 *S.Ct.* 1671, 131 *L.Ed.*2d 695 (1995). In *Travelers*, the United States Supreme Court interpreted provisions of the New York Public Health Law that imposed surcharges on patients covered by commercial insurers (but not those covered by Blue Cross or Blue Shield plans) and on certain health maintenance organizations (HMOs) according to the number of Medicaid recipients each enrolled. The Court held that the laws did not "relate to" employee benefit plans under ERISA, and so were not preempted. *Travelers, supra*, 514 *U.S.* at ----, 115 *S.Ct.* at 1674, 131 *L.Ed.*2d at 701.

The Court stated that although ERISA preemption is "clearly expansive," to interpret the language to its furthest extent would render the reach of the provision limitless. *Id.* at ----, 115 *S.Ct.* at 1677, 131 *L.Ed.*2d at 705. The Court determined that the basic thrust of the preemption provision was to "avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Id.* at ----, 115 *S.Ct.* at 1677- 78, 131 *L.Ed.*2d at 706. The New York public health law did not promote multiple regulatory schemes or provide alternate enforcement mechanisms relating to ERISA plans. *Id.* at ----, 115 *S.Ct.* at 1678, 131 *L.Ed.*2d at 707. The Court rejected the argument that laws indirectly affecting ERISA plans, without more, could be preempted. *Id.* at ----, 115 *S.Ct.* at 1679, 131 *L.Ed.*2d at 708. An indirect economic effect, however, that is so acute as to force changes in an ERISA plan can trigger preemption. *Id.* at ----, 115 *S.Ct.* at 1683, 131 *L.Ed.*2d at 713. Preemption does not occur "'if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability.'" *Id.* at ----, 115 *S.Ct.* at 1680, 131 *L.Ed.*2d at 708-09 (quoting *District of Columbia, supra*, 506

U.S. at ---- n. 1, 113 *S.Ct.* at 583 n. 1, 121 *L.Ed.*2d at 520 n.1).[1]

More recently, in *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, --- *U.S.* ----, 117 *S.Ct.* 832, 136 *L.Ed.*2d 791 (1997), the Court reaffirmed the trend initiated in *Travelers*. It found that ERISA did not preempt a California statute permitting contractors to pay laborers enrolled in an apprentice program less than the prevailing wage. The Court observed that the statute was enacted before ERISA and dealt with matters traditionally subject to local regulation and not within ERISA's concern for reporting, disclosure, and fiduciary responsibilities. In his concurrence, Justice Scalia suggested that the time had come to acknowledge that the criteria used in earlier cases for preemption had been abandoned, and that "our first take on this statute was wrong; that the 'relate to' clause of the pre-emption provision is meant, not to set forth a test for pre-emption, but rather to identify the field in which ordinary [principles of] preemption [apply]-- namely, the field of laws regulating 'employee benefit plans'" described in the statute itself. *Id.* at ----, 117 *S.Ct.* at 843, 136 *L.Ed.*2d at ----. Any other understanding of the "related to" language is "doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else." *Ibid.*

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[1] *Ingersoll-Rand Co. v. McClendon*, 498 *U.S.* 133, 111 *S.Ct.* 478, 112 *L.Ed.*2d 474 (1990) presaged this trend. Although *Ingersoll-Rand* held that ERISA preempted a wrongful discharge claim because it involved an allegation that the discharge was based on the employer's desire to avoid contributions to an ERISA-regulated fund, the Court stated that the analysis would proceed differently had the claim been based on "a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan," or when the existence of an ERISA plan was not a "critical factor" in establishing liability. *Id.* at 139, 111 *S.Ct.* at 483, 112 *L.Ed.*2d at 484. *See generally* Karen A. Jordan, Traveler's Insurance: *New Support for the Argument to Restrain ERISA Preemption, 13 Yale J. on Reg. 255* (1996).

B.

Several lower federal courts have applied *Travelers* to the issue of employee fringe benefit bonds. In *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 *F.*3d 561 (2d Cir. 1995), the union sued a contractor for failing to make timely fringe benefit payments. The contractor (Delta) filed for bankruptcy, and the union amended its complaint to include Delta's surety, which had issued a bond to Delta covering the fringe benefit payments. The Second Circuit held that ERISA did not preempt the union's claim against the surety.[2]

The court found that New York common law concerning surety liability did not mandate employee benefit structures or provide alternate enforcement mechanisms that would trigger preemption under *Travelers*. New York surety law made no reference to ERISA, did not conflict with any ERISA enforcement mechanism, did not touch on any of the rights or duties incident to the ERISA plan, and did not conflict with any cause of action under ERISA. *Greenblatt, supra*, 68 *F.*3d at 574-75. The union's cause of action against the surety on the bond is "but a 'run-of-the-mill' state law claim," similar to a tort or contract action. *Id.* at 574 (quoting *Mackey v. Lanier Collection Agency & Serv., Inc.* 486 *U.S.* 825, 833, 108 *S.Ct.* 2182, 2187, 100 *L.Ed.*2d 836, 846 (1988)). By analogous reasoning, United States District Judge Whitman Knapp interpreted *Travelers* and *Greenblatt* to hold that ERISA did not preempt claims against a surety that had issued public improvement payment bonds to a contractor pursuant to a New York statute. *Local 46, Metallic Lathers Union v. Trataros Constr., Inc.*, 920 *F.Supp.* 55 (S.D.N.Y.1996). *See also Bleiler v. Cristwood Constr., Inc.*, 72 *F.*3d 13 (2d Cir. 1995) (applying *Greenblatt* to surety insuring employer under public bond statute).

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[2] Procedurally, the court, finding no ERISA preemption, held that the district court did not have subject-matter jurisdiction and dismissed the case. Although "counterintuitive," the ERISA preemption provision can create federal jurisdiction. *Greenblatt, supra*, 68 *F.*3d at 571.

The Third Circuit has reached similar conclusions. *United Wire, Metal & Machine Health & Welfare Fund v. Morristown Memorial Hosp.*, 995 *F.*2d 1179 (3d Cir. 1993) upheld portions of the New Jersey Health Care Facilities Planning Act against an ERISA preemption challenge. The Planning Act was a comprehensive statute establishing hospital rates. The court held that ERISA did not preempt the Act, even though the Act would have an economic effect on the ERISA plans, in the form of increased costs. *Id.* at 1193.

In *Ragan v. Tri-County Excavating, Inc.*, 62 *F.*3d 501 (3d Cir. 1995), Judge Garth, writing for the court, found that an action by a union welfare fund on a privately-arranged bond was not preempted because its cause of action did not rely on or single out ERISA plans. *Id.* at 511. The court stated:

> Here, the district court need only determine [the surety's] obligations under the Bond. It need make no inquiry into the validity or status of the funds (or indeed whether they are ERISA funds), nor need it explore [the surety's] motives regarding employee benefits. The fact that the claimant . . . happens to be an ERISA fund is not the kind of critical factor in establishing liability that prompt[s] preemption . . .
>
> [*Ibid.* (internal quotations and citation omitted.)]

The Third Circuit distinguished its earlier decision in *Bricklayers Int'l Union, Local 33 Benefit Funds v. America's Marble Source, Inc.*, 950 *F.*2d 114 (3d Cir. 1991), which found a portion of the New Jersey Construction Workers' Fringe Benefit Security Act preempted, because that law was "specifically designed to affect employee benefit plans." *Ragan, supra*, 62 *F.*3d at 511 n. 6 (citing *Bricklayers, supra*, 950 *F.*2d at 117). In *Ragan*, the action by the union fund was available to it without regard to the existence of the ERISA statutory framework. [3] *See also Keystone Chapter, Associated*

[3] Both *Greenblatt, supra*, 68 *F.*3d at 575, and *Ragan, supra*, 62 *F.*3d at 512, found that a surety is not an "employer" as defined by ERISA, and so ERISA requirements for employers to fund benefit plans are not

(Footnote continued)

Builders & Contractors, Inc. v. Foley, 37 *F.*3d 945 (3d Cir. 1994) (holding Pennsylvania Prevailing Wage Act not preempted and could set minimum wages and option to contribute to employee benefit plans, but may not refer to ERISA plans or accord them special treatment), *cert. denied*, --- *U.S.* ----, 115 *S.Ct.* 1393, 131 *L. Ed.*2d 244 (1995).

We acknowledge the existence of other precedent finding preemption of actions by unions or union benefit plans against sureties for payments to fringe benefit or wage funds. *See, e.g., Williams v. Ashland Eng'g Co., Inc.*, 45 *F.*3d 588 (1st Cir.) (preempting Massachusetts public bond law that specifically referred to ERISA-governed plans and provided a special source of recovery for unpaid contributions), *cert. denied*, --- *U.S.* ----, 116 *S.Ct.* 51, 133 *L. Ed.*2d 16 (1995); *Electrical Workers Health & Welfare Trust v. Marjo Corp.*, 988 *F.*2d 865 (9th Cir. 1992) (disavowing pre-*Travelers* precedent and stating ERISA preempted action against surety on bond). Lower federal courts have also found preemption of laws that mention employee benefit plans or create causes of action under circumstances ERISA does not permit. *See Plumbing Indus. Bd. v. L & L Masons, Inc.*, 927 *F.Supp.* 645 (S.D.N.Y. 1996) (invalidating section of New York Lien Law in action against contractor for subcontractor's default, and holding Lien Law created ERISA payment obligation and explicitly mentioned plans); *Blackburn v. Iversen*, 925 *F.Supp.* 118 (D.Conn. 1996) (invalidating Connecticut law making officers and directors liable for corporate default on employee benefit plan payments); *Burgio & Campofelice, Inc. v. New York State Dep't of Labor*, 914 *F.Supp.* 931 (W.D.N.Y. 1996) (distinguishing *Travelers* and *Greenblatt* and holding ERISA preempted New York law setting wage supplements because law holding contractor liable for subcontractor's default law related to ERISA plans), *vacated and remanded*, 107 *F.*3d 1000, 1997 WL 89121 (2d Cir. March 4, 1997); *Minnesota*

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applicable to them and do not provide or negate a cause of action. *See* 29 *U.S.C.* § 1002(5) (defining "employer" under ERISA); 29 *U.S.C.* § 1145 (requiring employer to make ERISA benefit payments).

Chamber of Commerce & Indus. v. Hatch, 672 *F.Supp.* 393 (D.Minn. 1987) (holding Minnesota statute requiring bonds for payment of employee health benefits preempted because it interfered with federal control over plan administration).

Several state courts have found no preemption of claims for employee fringe benefits in circumstances similar to those presented here. *See Eacott v. Insurance Co. of North America*, 40 *Conn.App.* 777, 673 *A.*2d 587 (1996) (reversing lower court and holding, based on *Bleiler*, *supra*, action by union funds against surety based on labor and material payment bond issued pursuant to statute not preempted); *Hawai'i Laborers' Trust Funds v. Maui Prince Hotel*, 81 *Hawai'i* 487, 918 *P.*2d 1143 (1996) (upholding mechanics' lien law in action by trust funds to collect delinquent contribution because no clear intention in ERISA to preempt traditional areas of state police power); *Seaboard Surety Co. v. Indiana State Dist. Council of Laborers & Hod Carriers Health & Welfare Fund*, 645 *N.E.*2d 1121 (Ind.Ct.App. 1995) (rejecting preemption of state law requiring fringe benefit bonds because law was over a century old and was within area of traditional state authority; did not affect relations among parties to ERISA plans; and effect on plans, if any, was incidental); *Carpenters Local 261 Health & Welfare Fund v. National Union Fire Ins.*, 686 *A.*2d 1373 (Pa.Commw.Ct. 1996) (following *Ragan* and holding no preemption of action under public bond law because law not related to ERISA plans or their enforcement). *But see Operating Engineers Pension Trust v. Insurance Co. of the West*, 35 *Cal.App.*4th 59, 42 *Cal.Rptr.*2d 1 (preempting third-party beneficiary claim against surety based on payment and performance bonds because cause of action merely supplemented ERISA remedies), *cert. denied*, --- *U.S.* ----, 116 *S.Ct.* 569, 133 *L. Ed.*2d 493 (1995).

Generally, state courts that have found ERISA preemption have considered laws that create additional causes of action against parties that have no contractual obligation to ERISA plans or laws that specifically name ERISA plans. *See, e.g.*, *Puget Sound Elec. Workers Health & Welfare Trust Fund v.*

Merit Co., 123 *Wash.*2d 565, 870 *P.*2d 960 (1994) (en banc) (finding preemption of state statute requiring contractor to guarantee subcontractor's obligations, because such law potentially funds benefit plans through additional enforcement mechanism other than ERISA); *Carpenters Southern Cal. Administrative Corp. v. El Capitan Dev. Co.*, 53 *Cal.*3d 1041, 282 *Cal.Rptr.* 277, 811 *P.*2d 296 (preempting state law that created liens on real property in favor of trust funds in amount equal to fringe benefit contributions owed to funds because law singled out ERISA funds for special treatment and by regulating ERISA funds through additional funding mechanism), *cert. denied*, 502 *U.S.* 963, 112 *S.Ct.* 430, 116 *L. Ed.*2d 450 (1991); *Prestridge v. Shinault*, 552 *So.*2d 643 (La.Ct.App. 1989) (finding preemption of state law creating cause of action for trustees of benefit plan to enforce terms of health and welfare benefits plan), *writ denied*, 559 *So.*2d 131 (La. 1990).

There is thus a thin line between claims for payment to employee fringe benefit plans that are preempted by ERISA and those that are not. The sureties argued before us that the bonds were issued pursuant to a statutory requirement, and therefore *Greenblatt* and *Ragan* do not apply because the causes of action involved there arose from common-law breaches of contract rather than from legislation requiring that public projects be bonded.

We find the distinction unconvincing. ERISA does not make such a distinction, and the analysis of the federal courts does not turn on the possible difference between a publicly-required bond and one entered into voluntarily. See *Greenblatt*, *supra*, 68 *F.*3d at 574 (equating causes of action under state surety law with common-law actions for purposes of ERISA preemption analysis); *Bleiler*, *supra*, 72 *F.*3d at 16 (applying *Greenblatt* to Connecticut bond statute).

The lawsuits are common-law actions on contracts the employer made as a condition for obtaining a public construction contract. They do not represent actions that undermine the set of remedies ERISA provides to beneficiaries under its

"comprehensive civil enforcement scheme." *Pilot Life Ins. Co. v. Dedeaux*, 481 *U.S.* 41, 54, 107 *S.Ct.* 1549, 1556, 95 *L. Ed.*2d 39, 52 (1987) (preempting common-law claims of tortious interference and fraud in withholding benefits from plan because such claims interfered with ERISA civil remedies); *Plumbing Indus. Bd.*, *supra*, 927 *F.Supp.* at 648 (preempting lien law because it created obligation for ERISA contributions when no independent basis for obligation existed).

The State must be neutral concerning the payment of fringe benefits. New Jersey's Bond Act does not by its terms require such payments. A contractor may decide to employ union or non-union labor. *Tormee Constr., Inc. v. Mercer Cty. Improvement Auth.*, 143 *N.J.* 143, 669 *A.2d* 1369 (1995) (holding public agencies could not restrict public-construction projects to members of particular labor unions or to union labor only). In short, it is the contractor who has created the obligation. The Bond Act is both ERISA-neutral and union-neutral. Like the vineyard owner in the parable, the contractor is being asked to pay only what was promised to the workers. *See In re San Juan Dupont Plaza Hotel Fire Litigation*, 56 *F.*3d 295, 310 (1st Cir. 1995).

To hold otherwise would lead to paradoxical results. For example, employees paid solely in cash that covered their benefit needs would be able to recover against the sureties because of the provisions in the bonds covering labor performed, but those paid in a combination of cash and fringe benefits would not be able to recover the latter. *Cf. Keystone*, *supra*, 37 *F.*3d at 959-60 (noting that allowing preemption under similar circumstances would create "disincentive" against awarding benefits). Such an interpretation would also permit nonunion employees, who did not have a collective bargaining agreement covering ERISA-regulated plans, to recover against the sureties, but prohibit union employees from pursuing their claims because they did have such plans.

We find ourselves in accord with *Dillingham*, *Travelers*, *Greenblatt*, and *Ragan* and our own earlier decisions; they represent the correct interpretation of the ERISA preemption

provision. The Bond Act is a generally applicable law that functions without any reference to ERISA. *See Ingersoll-Rand*, *supra*, 498 *U.S.* at 139, 111 *S.Ct.* at 483, 112 *L.Ed.*2d at 484. It does not frustrate ERISA's goal of uniform plan administration, make reference to ERISA, conflict with ERISA enforcement mechanisms, or touch upon any of the rights or duties incident to ERISA plans. *See Greenblatt*, *supra*, 68 *F.*3d at 574-75; *Blackburn*, *supra*, 925 *F.Supp.* at 121. Cost-uniformity was "almost certainly not an object of [ERISA] preemption." *Travelers*, *supra*, 514 *U.S.* at ----, 115 *S.Ct.* at 1673, 131 *L.Ed.*2d at 709. That the Bond Act may cause the cost of doing business in New Jersey to be different from the cost in other states is not inconsistent with the goal of uniform supervision of employee benefit plans. *See United Wire*, *supra*, 995 *F.*2d at 1194.

The Bond Act has existed in various forms for almost eighty years, long before Congress adopted ERISA. *See L.* 1918, c. 75, § 1. *Cf. Seaboard*, *supra*, 645 *N.E.*2d at 1127 (finding age of law to support finding of no preemption). It was designed to protect public agencies, laborers, and material suppliers who work on public projects from the insolvency of a general contractor. *See Unadilla Silo Co. v. Hess Bros. Inc.*, 123 *N.J.* 268, 276-77, 586 *A.*2d 226 (1991); *Seaboard Sur. Co. v. Board of Chosen Freeholders*, 222 *N.J.Super.* 409, 418, 537 *A.*2d 310 (App.Div.), *certif. denied*, 111 *N.J.* 630, 546 *A.*2d 545 (1988). Like the provision in the Waterfront Act, the Bond Act and ERISA serve different purposes, although they both protect workers. *See Local 1804*, *supra*, 85 *N.J.* at 616, 428 *A.*2d 1283.

We hold that ERISA does not preempt suits by union trust funds against sureties that have issued bonds to employers for public works projects pursuant to the Bond Act. We therefore affirm the decision of the Appellate Division reinstating Local 825's complaints against IFIC and First Indemnity.

In a brief discussion, the Appellate Division found that "wages" include fringe benefits and stated, "[w]hen the bond includes the total of the workers' wages, there is no reason to

require a separate bond for a portion of the same." 287 *N.J.Super.* at 509, 671 *A.*2d 596. Before us the sureties argued that this was an unfair imposition because they had not bargained with the unions or the trust funds to include fringe benefits and because the language of the bonds did not include fringe benefit payments.

We hesitate to address the issue in generalities because the language of the bonds issued by IFIC to Gram differs from the language of the bonds issued by First Indemnity to LBS. Generally, both sets of bonds purport to cover the lawful claims of subcontractors, material suppliers, and laborers for labor performed or material supplied.

The basic question is whether the "labor performed" clauses in the bonds issued by First Indemnity and IFIC include payments into fringe benefit funds on behalf of the laborers. The Bond Act provides only:

> When public buildings or other public works or improvements are about to be constructed . . . [the contracting public agency] shall require the payment and performance bond, as provided for by law, with an obligation for the payment by the contractor, and by all subcontractors, for all labor performed or materials . . . used or consumed in [the project].
>
> [*N.J.S.A.* 2A:44-143a (1).]

As noted, the Act is neutral on the question of fringe benefits; it does not explicitly discuss the surety's responsibility to pay fringe benefit contributions. Historically, payments for all "labor performed" have been considered to include more than wages. *See United States ex rel. Sherman v. Carter*, 353 *U.S.* 210, 77 *S.Ct.* 793, 1 *L.Ed.*2d 776 (1957) (holding Miller Act provision insuring employer payment of "sums justly due" for labor performed not limited to wages). Sureties in New Jersey were aware of a practice of including fringe benefits within the definition of wages. *See Newark Laborers' Pension-Welfare Funds v. Commercial Union Ins. Co.*, 126

N.J.Super. 1, 312 *A.*2d 649 (App.Div. 1973) (noting surety had paid benefit contributions owed, and holding that costs and attorney's fees were recoverable against surety in action to collect an employer's delinquent contributions).

In addition, some of the bonds disclaim the creation of third-party rights or any obligation for payment to any party other than the named obligee. The Bond Act provides that only the named obligee, and any subcontractor performing labor or supplying materials to the project, may have a claim against the surety under the bonds. *N.J.S.A.* 2A:44-143b. Does the Bond Act preclude an action by one other than the named obligee (usually the contractor or the worker)? If so, would an amended complaint joining a class representative of the individual workers in the Local's actions against the sureties satisfy that requirement?

The issues involve the interplay between the Bond Act and the interpretation of the bonds' terms. In the IFIC matter, the surety did not file an answer to the complaint, moving instead for summary judgement on the ground of ERISA preemption. First Indemnity raised several procedural defenses to the claims. Because the trial courts held that ERISA preempted the Local's claims, they did not reach these issues.

The judgment of the Appellate Division reinstating the complaints is affirmed.

For affirmance--Chief Justice PORITZ, and Justices HANDLER, O'HERN, GARIBALDI, STEIN and COLEMAN--6.

Opposed--None.

671 A.2d 596

BOARD OF TRUSTEES OF OPERATING ENGINEERS LOCAL 825 FUND SERVICE FACILITIES,

Plaintiff-Appellant,

v.

FIRST INDEMNITY OF AMERICA INSURANCE COMPANY,

Defendant-Respondent,

and

L.B.S. CONSTRUCTION CO., INC.,

Defendants.

BOARD OF TRUSTEES OF OPERATING ENGINEERS LOCAL 825 FUND SERVICE FACILITIES,

Plaintiff-Appellant,

v.

INTERNATIONAL FIDELITY INSURANCE COMPANY, a Corporation,

Defendant-Respondent.

Superior Court of New Jersey
Appellate Division

Argued January 23, 1996 — Decided February 20, 1996.

SYNOPSIS

Union benefits fund brought action against sureties to recover unpaid pension benefits from bonds issued under New Jersey Public Works Bond Act. The Superior Court, Law Division, Essex County, granted summary judgment for surety after finding that Employee Retirement Income Security Act

(ERISA) preempted state statute. The Superior Court, Appellate Division, Dreier, P.J.A.D., held that ERISA preemption did not bar action to recover unpaid pension benefits from surety bonds issued under the New Jersey Public Works Bond Act.

Reversed and remanded.

Pensions—105.1

States—18.53

ERISA preemption did not bar union's action to recover unpaid pension benefits from contractors through surety bonds issued under the New Jersey Public Works Bond Act. 29 U.S.C.A. §§ 1132(a), 1144 (a,b)(2)(A,B); N.J.S.A. 2A:44-143, subd. a.

On appeal from the Superior Court of New Jersey, Law Division, Essex County.

Before Judges DREIER, ARNOLD M. STEIN and CUFF.

Albert G. Kroll, argued the cause for appellant Board of Trustees of Operating Engineers Local 825 Fund Service Facilities (A-368-94T2) (*Kroll & Gaechter*, attorneys; *Mr. Kroll*, on the brief).

Joseph C. Glavin, Jr., argued the cause for respondent First Indemnity of America Insurance Company (*Mr. Glavin* and *Laurie Rush-Masuret*, on the brief).

James R. Zazzali, *amicus curiae*, argued the cause for New Jersey State Carpenter Benefit Funds, Carpenters Local # 6 Benefit Funds, the Laborers Local Nos. 472 and 172 Welfare and Pension Funds, The Teamsters Local 408 Welfare and Pension Funds, and the Laborers Local Nos. 72, 156, 569 and 711 Welfare and Pension Funds (*Zazzali, Zazzali, Fagella & Nowak*, attorneys; *Mr. Zazzali* and *Kenneth I. Nowak*, of counsel and on the brief and *Edward H. O'Hare*, on the brief).

N. Janine Dickey, argued the cause for Board of Trustees of Operating Engineers Local 825 Fund Service Facilities (A-5077-94T5) (*Ms. Dickey*, on the brief).

Thomas J. Demski, argued the cause for respondent International Fidelity Insurance Company (*Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross*, attorneys; *Mr. Demski*, of counsel, *Mark E. Duckstein*, of counsel and on the brief).

The opinion of the court was delivered by

DREIER, P.J.A.D.

Plaintiff appeals from summary judgments in two cases that we consolidate for the purpose of this opinion.

The cases before us present a novel issue for the New Jersey courts: whether the preemption clauses of the Employment Retirement Income Security Act (ERISA), 29 *U.S.C.A.* §§ 1001-1461 foreclose a Law Division action to recover unpaid pension benefits through surety bonds issued under the New Jersey Public Works Bond Act, *N.J.S.A.* 2A:44-143 to 147.

The plaintiff in both cases is the Board of Trustees of Operating Engineers Local 825 Fund Services Facilities, a union benefits fund. The Union had negotiated collective bargaining agreements with two separate construction contractors requiring each contractor to make contributions on behalf of their union employees to various benefits funds administered by plaintiff. The contractors had been hired for various public-works projects and thus had executed the payment and performance bonds required by the Public Works Bond Act.

When each contractor failed to make all the contribution payments mandated by the collective bargaining agreement, plaintiff in separate actions sued the sureties that had provided the bonds: First Indemnity of America Insurance Company,

(First Indemnity) [1] and International Fidelity Insurance Company (International). The amounts unpaid were estimated at $73,624.94 and $95,612.53, respectively. In each case, the trial court granted the surety's motion for summary judgment on the ground that the suit was preempted by the ERISA clause providing that the Act supersedes all state laws that "relate to" an ERISA plan. Since ERISA provides no mechanism for recovery against a surety, the courts' rulings left plaintiff with no remedy to recover the unpaid benefits.

ERISA is a comprehensive scheme of federal regulation of employee benefit plans, 29 *U.S.C.A.* §§ 1001-1461; it includes civil enforcement remedies against the employer. 29 *U.S.C.A.* § 1132(a). In recognition of Congress's intent that qualifying benefit plans be under uniform federal control, ERISA contains three provisions governing preemption of state laws that might impinge upon this federal scheme. First, the main preemption clause provides that ERISA's provisions "shall supersede any and all State laws insofar as they may now or hereafter *relate to any employee benefit plan*" covered by ERISA. 29 *U.S.C.A.* § 1144(a) (emphasis added). Second, in the so-called "saving clause," the act creates an exception for certain state laws: "nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 *U.S.C.A.* § 1144(b)(2)(A). Plaintiff argues that, even if the main preemption clause applies, plaintiff's claim is permitted under this "saving clause." We need not reach this argument as we hold that ERISA does not preempt this State action. The third provision, 29 *U.S.C.A.* § 1144(b)(2)(B), is not implicated in these appeals.

The New Jersey Public Works Bond Act sets forth the substantive requirements for bonding of contractors hired to

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[1] In the First Indemnity action, plaintiff also added as defendants the bankrupt construction company and two fictitious-named defendants. Plaintiff represents in its notice of appeal, however, that none of the additional entities participated in the action.

perform work on public projects and also prescribes the procedural mechanisms for enforcing such bonds. The necessity for a bond is created by N.J.S.A. 2A:44-143a, reading in part as follows:

> a. When public buildings or other public works or improvements are about to be constructed, erected, altered or repaired under contract, at the expense of the State or any county, municipality or school district thereof, the board, officer or agent contracting on behalf of the State, county, municipality or school district, shall require the usual bond, as provided for by law, with good and sufficient sureties, with an additional obligation for the payment by the contractor, and by all subcontractors, *for all labor performed* or materials, provisions, provender or other supplies, teams, fuels, oils, implements or machinery used or consumed in, upon, for or about the construction, erection, alteration or repair of such buildings, works or improvements.
>
> [Emphasis added.]

The trial judges reasoned that the Bond Act was "related to" ERISA because, under their views, it created a new substantive cause of action against sureties which did not exist under ERISA.[2] In considering the case against First Indemnity, the judge relied on *Shaw v. Delta Air Lines, Inc.*, 463 *U.S.* 85, 98, 103 *S.Ct.* 2890, 2899, 77 *L.Ed.*2d 490, 501 (1983) for his threshold assumption that a state law need not be specifically designed to affect ERISA plans to be preempted. However, the judge's ultimate conclusion then apparently rested on two cases involving state statutes which, unlike the statute before us, specifically targeted employee benefit plans: *Bricklayers Local 33 v. America's Marble*

[2] The reasoning and analysis of the judge who decided the First Indemnity case was adopted with little additional comment by the judge deciding the case against International.

Source, 950 *F.*2d 114, 117 (3d Cir.1991) (holding that ERISA preempted New Jersey's Fringe Benefit Act which expressly authorized actions to recover unpaid benefit contributions and thereby created substantive rights not otherwise conferred by ERISA), and *Minnesota Chamber of Commerce & Industry v. Hatch*, 672 *F.Supp.* 393, 395 (D.Minn.1987) (*Hatch*) (finding preemption where statute requiring employers to post surety bonds against payment of employee health benefits sought to exercise state control over the plans' administration, an exclusively federal concern under ERISA).

On the basis of these decisions, the judge concluded that a law may also be preempted if it regulates matters dealing with the administration of ERISA plans, such as disclosure, funding, reporting, vesting, and enforcement, matters that are regulated by ERISA itself. *See* 29 *U.S.C.A.* §§ 1021- 1031, 1051-1061, 1081-1086, 1131-1145. In the judge's view, the New Jersey Public Works Bond Act encroached on the funding and enforcement of a plan covered by ERISA and was therefore preempted.

At the time both judges delivered their opinions on July 27, 1994 and on May 18, 1995, their conclusions appeared to be amply supported by the majority of cases considering whether ERISA preempts efforts to collect unpaid benefit contributions from a guarantor or surety or through a mechanic's lien, under state statute or common law provisions. *Accord Williams v. Ashland Eng'g Co.*, 45 *F.*3d 588, 593-594 (1st Cir.) *cert. denied*, --- *U.S.* ----, 116 *S.Ct.* 51, 133 *L.Ed.*2d 16 (1995); *Trustees of Elec. Workers Health and Welfare Trust v. Marjo Corp.*, 988 *F.*2d 865, 868 (9th Cir.1993) (*Marjo*); *Bricklayers*, *supra*, 950 *F.*2d at 118; *M.C. Sturgis v. Herman Miller, Inc.*, 943 *F.*2d 1127, 1130 (9th Cir.1991); *Iron Workers Mid-South Pension Fund v. Terotechnology Corp.*, 891 *F.*2d 548, 556 (5th Cir.1990); *Hatch*, *supra*, 672 *F.Supp.* at 398; *Puget Sound Elec. Workers Health and Welfare Trust Fund v. Merit Co.*, 123 *Wash.*2d 565, 870 *P.*2d 960, 964 (1994) (en banc); *Carpenters S. California Admin. Corp. v. El Capitan Dev. Co.*, 53 *Cal.*3d 1041, 282 *Cal.Rptr.* 277, 286, 811 *P.*2d 296, 305 *cert. denied*, 502 *U.S.* 963, 112 *S.Ct.* 430,

116 *L.Ed.*2d 450 (1991) (*El Capitan*); *Prestridge v. Shinault*, 552 *So.*2d 643, 648 (La.Ct.App.1989). Apparently, only one published case, not initially cited by the parties, directly rejected the preemption argument. *Seaboard Sur. Co. v. Indiana State Dist. Council of Laborers and Hod Carriers Health and Welfare Fund*, 645 *N.E.*2d 1121, 1127-28 (Ind.Ct.App.1995) (no preemption of general state bonding statute).

Despite the apparently overwhelming weight of authority, closer examination reveals that each of the earlier cases finding preemption, including *Bricklayers* and *Hatch*, was factually distinguishable from the issue at hand. Moreover, the "no preemption" finding in *Seaboard*, the case more directly on point, is supported by two subsequent cases from the Second Circuit, *Bleiler v. Cristwood Construction, Inc.*, 72 *F.*3d 13, 16 (2d Cir.1995) and *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 *F.*3d 561, 576 (2d Cir.1995), and the reasoning in a subsequent, distinguishable, but factually similar decision from the Third Circuit, *Ragan v. Tri-County Excavating, Inc.*, 62 *F.*3d 501, 510-513 (3d Cir.1995).

The issue of ERISA preemption of a union's state court actions to collect unpaid benefit contributions arises under a number of somewhat different factual and legal scenarios. The first group of cases consider whether state statutes that specifically target benefit plans are preempted, *Williams*, *supra*, 45 *F.*3d at 590 n. 3; *M.C. Sturgis*, *supra*, 943 *F.*2d at 1129; *Iron Workers Mid-South Pension Fund*, *supra*, 891 *F.*2d at 555-556 n. 7; *El Capitan*, *supra*, 282 *Cal.Rptr.* at 278, 811 *P.*2d at 297 n. 1; *Prestridge*, *supra*, 552 So.2d at 645. Without exception, the courts have found that statutes which directly refer either to "fringe benefits" or "health" or "welfare" or "pension" plans plainly "relate to" ERISA and are therefore preempted. *Williams*, 45 *F.*3d at 593-594; *M.C. Sturgis*, 943 *F.*2d at 1130; *Iron Workers Mid-South Pension Fund*, 891 *F.*2d at 556; *El Capitan*, 282 *Cal.Rptr.* at 286, 811 *P.*2d at 305; *Prestridge*, 552 *So.*2d at 648.

A second group of cases considers the preemption issue for state bonding statutes that specifically require the general

contractor to guarantee a subcontractor's payments to its creditors. *See, e.g., Marjo, supra,* 988 *F.*2d at 866; *Puget Sound supra,* 870 *P.*2d at 961. Unlike the first category of cases, and similar to the New Jersey Bond Act, these statutes do not explicitly create obligations for benefit plans. *Marjo,* 988 *F.*2d at 866 n. 1; *Puget Sound,* 870 *P.*2d at 963. In *Puget Sound,* the court rejected the argument that the statutes merely provided a collection mechanism and were therefore not preempted under *Mackey v. Lanier Collection Agency and Serv. Inc.,* 486 *U.S.* 825, 829, 108 *S.Ct.* 2182, 2185, 100 *L.Ed.*2d 836 (1988). *Puget Sound,* 870 *P.*2d at 963-64. The general contractor had never agreed to contribute to the benefit funds. *Id.* at 964. The court explained that the Washington statute therefore created an "entirely separate cause of action against the general contractors who otherwise have no contractual obligation to the plans" and potentially funded the plans through an additional mechanism not available under ERISA. *Ibid.* The court in *Marjo* also viewed the statutes as effectively permitting the state to "expand liability for contributions to ERISA plans as it sees fit." 988 *F.*2d at 868.

A third group of cases has emerged in the past year. These cases examine ERISA preemption of sureties' obligations to compensate benefit funds under the varying terms of bonds provided to construction contractors who had agreed to be directly responsible for funding ERISA plans. Earlier cases had held that sureties could not be sued in federal actions under 29 *U.S.C.A.* § 1132(a)(1)(B) as employers under ERISA, but did not reach the issue of preemption. *See, e.g., Giardiello v. Balboa,* 837 *F.*2d 1566, 1569-70 (11th Cir.1988); *Xaros v. U.S. Fidelity and Guaranty Co.,* 820 *F.*2d 1176, 1180 (11th Cir.1987); *Carpenters S. Cal. Admin. Corp. v. D & L. Camp Constr. Co.,* 738 *F.*2d 999, 1001 (9th Cir.1984), *disavowed by Marjo,* 988 *F.*2d at 867. The majority of the recent cases, however, conclude that ERISA does not preempt the surety's obligations. *Bleiler v. Cristwood Contr., Inc.,* 72 *F.*3d 13, 16 (2d Cir.1995); *Greenblatt, supra,* 68 *F.*3d at 576; *Ragan, supra,* 62 *F.*3d at 513; *Seaboard, supra,* 645 *N.E.*2d at 1127-1128. *But see Operating Eng'rs Pension Trust v. Insurance Co. of the West,* 35 *Cal.App.*4th 59, 42 *Cal.Rptr.*2d 1, 5

(1995) (state action preempted).

The bonding obligation at issue arises in one of two ways: as a matter of private contract or as mandated by state statute. Counsel for International Fidelity suggested to the trial court that a privately contracted bond, "as a voluntary agreement not mandated by an Act of state," might not trigger the preemption provision. The federal cases, however, appear not to turn on this distinction, employing similar reasoning under both scenarios: 1) the actions arose under laws which made no specific reference to benefit plans; 2) the laws were generally applicable, functioning irrespective of the existence of ERISA and only indirectly affecting a plan's assets; and 3) the claims did not conflict with ERISA enforcement mechanisms because sureties are not employers within the meaning of ERISA.

In *Ragan*, the Third Circuit considered the issue of preemption of a common law action to recover under a private bond contract. 62 *F.*3d at 511. The court explicitly distinguished its holding in *Bricklayers* as inapposite due to the Fringe Benefit Act's specific reference to benefit funds. *Id.* at 511 n. 6. The common law cause of action at issue in *Ragan*, on the other hand, involved a law of general application. *Id.* at 511. It neither referred to benefit plans, nor was it predicated on their existence. *Ibid.* The court observed that:

> Simply because the sums collected may ultimately feed into an ERISA-governed fund does not in itself mean that the cause sued upon creates rights or restrictions. . . .
>
> [*Id.* at 512.].

The court agreed with the determinations of the Ninth and Eleventh Circuits that the definition of employer for ERISA purposes did not include a surety. *Id.* at 512. The court noted that while the employer may purchase the surety's services, the surety itself "does not stand in an employer relationship to the claimants, nor is it the agent of the employer." *Id.* at 512-513.

In *Bleiler*, the Second Circuit was confronted with a general state bonding statute for public works, similar to the New Jersey Bond Act. *Bleiler*, 72 *F.*3d at 16; *Bleiler v. Cristwood Contracting Co.*, 868 *F.Supp.* 461, 463 n. 1 (D.Conn.1994) (bond furnished pursuant to *Conn.Gen.Stat.* § 49-41). The court found its earlier reasoning in *Greenblatt v. Delta Plumbing & Heating Corp.*, concerning a private bond contracted under New York Surety Law, to be entirely applicable to the issue. *Bleiler*, 72 *F.*3d at 16; *Greenblatt*, 68 *F.*3d at 567, 575. In *Greenblatt*, after noting that the state surety law made no explicit reference to ERISA plans, the court examined whether the action was preempted under the standards of either *Mackey*, *supra*, or the then-recently issued *New York State Conference of Blue Cross & Blue Shield v. Travelers Ins. Co.*, 514 *U.S.* 645, 115 *S.Ct.* 1671, 131 *L.Ed.*2d 695 (1995). *Greenblatt*, 68 *F.*3d at 574-576. The court concluded that the state's surety law "does not bind the hands of the ERISA trustees or regulate them in any fashion." *Ibid.* Nor does it "threaten a 'multiplicity of regulation'" because, at most, the provisions might affect the collectability of funds. *Ibid* (quoting *Blue Cross/Blue Shield*, 514 *U.S.* at ----, 115 *S.Ct.* at 1677, 131 *L.Ed.*2d at 706). Rather, "[a] claim on a surety bond is but a 'run-of-the-mill state law claim[ ],' similar to tort or non-plan related contract action to which ERISA plans may be a party." *Id.* at 574 (quoting *Mackey*, 486 *U.S.* at 833, 108 *S.Ct.* at 2187, 100 *L.Ed.*2d at 846).

The court also examined whether the action conflicted with ERISA's enforcement provisions. *Id.* at 575. It observed that the provisions applied only to employers, and that sureties were not employers within the scope of the definition. *Ibid.* The court therefore concluded that actions on the bond did not provide the kind of alternative remedy of enforcement against employers which would be prohibited by ERISA. *Id.* at 576.

The court in *Seaboard* engaged in similar analyses, but also noted that legislative history supported the conclusion that "the ERISA remedy for delinquent contributions was not intended to be exclusive." 645 *N.E.*2d at 1125. The court cited a House of Representative committee report on a 1980 ERISA

amendment that expanded the available remedies to include a suit by a plan against an employer. *Ibid.* That report commented that the "amendment does not change any other type of remedy permitted under State or Federal law with respect to delinquent multiemployer plan contributions." *Id.* 645 *N.E.*2d at 1124 (citing H.R.Rep. No. 869(II), 96th Cong., 2d Sess. 48-49 (1980), *reprinted in* 1980 *U.S.C.C.A.N.* 3037-38).

The recent cases just cited demonstrate a clear change in emphasis. This change was also signaled by the United States Supreme Court in *Blue Cross/Blue Shield, supra*, where the Court counseled reliance on the underlying purposes of 29 *U.S.C.A.* § 1144(a) which required preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) and not exempt under section 1003(b) of this title." The Court stated:

> We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.
>
> [--- *U.S.* at ----, 115 *S.Ct.* at 1677, 131 *L.Ed.*2d at 705.]

The Court found such purpose to be the avoidance of "a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Id.* at ----, 115 *S.Ct.* at 1677, 131 *L.Ed.*2d at 706. Congress never intended, however, to bar state action in fields of traditional state regulation. *Id.* at ----, 115 *S.Ct.* at 1676, 131 *L.Ed.*2d at 704-705.

N.J.S.A. 2A:44-143, requiring bonds from contractors and subcontractors of public works projects, was initially enacted nearly eighty years ago. ERISA did not exist and employment benefit plans themselves were in their infancy. Bonds issued under the statute provide the protected workers with a surety "for the payment . . . for all labor performed." *N.J.S.A.* 2A:44-143(a). It is nonsensical to divide the contractor or subcontractor's responsibility to pay for labor between the

portion of the employee's wages that are received in cash, are directed into a credit union, or are directed into a retirement or other employee benefit plan. The parties have provided no evidence that such an arrangement was contemplated. The contractor's requirement to make the fringe benefit payments is as much a payment for labor as is the money in the worker's pay envelope or pay check.

To follow the sureties' arguments, if two employees were owed wages, and one of the employees had directed that a portion of his wages be paid into a retirement plan, but the other had not and was to receive his wages in cash, the sureties would contend that they were responsible for the cash payment, but not the payment into the retirement fund. Thus the surety's obligation for which it charged a full premium would vary depending upon the number of workers who elected to participate in the retirement fund. This would make no sense.

It is disingenuous for the sureties to suggest that the only way the Union could have protected its members' right was for it to have purchased a fringe benefit bond. This may be necessary under some private employment bonds where the contractor is not statutorily required to obtain a surety bond for payment of all labor performed, but not under the statutory bond here under consideration.[3] When the bond includes the total of the workers' wages, there is no reason to require a separate bond for a portion of the same.

The purpose of ERISA is to protect employees, not to provide loopholes through which a surety for the payment for labor performed on public work projects can avoid such payment. Such an interpretation would leave the workers without funding for the very payments that ERISA was meant to protect and that their employers had purchased bonds to insure. Such a result would be nonsensical, and, without explicit

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[3] We also note that the purchase of a specific fringe benefit bond did not inhibit the surety in *Greenblatt* from advancing its preemption argument.

direction, we would not ascribe to Congress the intention to void existing general provisions of state law protecting the very beneficiaries of the ERISA statute.

The summary judgments from which plaintiff appeals are reversed and this matter is remanded to the trial courts for further proceedings in accordance with this opinion.

NEW JERSEY PUBLIC WORKS BOND ACT — PRE-1996 AMENDMENTS

ARTICLE 12. BONDS OF CONTRACTORS ON PUBLIC WORKS AND IMPROVEMENTS

2A:44-143. Additional bond for payment of claims for labor, material and supplies; waiver

When public buildings or other public works or improvements are about to be constructed, erected, altered or repaired under contract, at the expense of the State or any county, municipality or school district thereof, the board, officer or agent contracting on behalf of the State, county, municipality or school district, shall require the usual bond, as provided for by law, with good and sufficient sureties, with an additional obligation for the payment by the contractor, and by all subcontractors, for all labor performed or materials, provisions, provender or other supplies, teams, fuels, oils, implements or machinery used or consumed in, upon, for or about the construction, erection, alteration or repair of such buildings, works or improvements.

When such contract is to be performed at the expense of the State and is entered into by the Director of the Division of Building and Construction or State departments designated by the Director of the Division of Building and Construction, and such contract is for a sum not exceeding $20,000.00, the director or the State departments may at their discretion waive the bond requirement of this section. Amended by L.1979, c. 408, § 1, eff. Feb. 8, 1980.

2A:44-144. Sureties on and amount of bond; condition for payment of claims; bond deposited and held for use of interested parties

The bond required by this article shall be executed by the contractor with such sureties as shall be approved by the board, officer or agent acting on behalf of the state, county,

municipality or school district, in an amount equal to at least 100 per cent of the contract price, and shall be conditioned for the payment by the contractor, and by all subcontractors, or his or their subcontractor, of all indebtedness which may accrue to any person, firm or corporation, in an amount not exceeding the sum specified in the bond, on account of any labor performed or materials, provisions, provender or other supplies, or teams, fuels, oils, implements or machinery used or consumed in, upon, for or about the construction, erection, alteration or repair of the public building or public work or improvement.

The bond shall be deposited with and be held by the board, officer or agent acting on behalf of the state, county, municipality or school district, for the use of any party interested therein.

2A:44-145. Statements of claimants filed with sureties on bond; time for action on bond

Any person to whom any money shall be due on account of having performed any labor or furnished any materials, provisions, provender or other supplies, or teams, fuels, oils, implements or machinery in, upon, for or about the construction, erection, alteration or repair of any public building or other public work or improvement, shall, at any time before the acceptance of such building, work or improvement by the duly authorized board or officer, or within 80 days thereafter, furnish the sureties on the bond required by this article a statement of the amount due to him.

No action shall be brought against any of the sureties on the bond required by this article until the expiration of 80 days after the acceptance of the building, work or improvement by the duly authorized board or officer.

2A:44-147. Form of and conditions in bond

The bond required by this article shall be in substantially the following form:

"Know all men by these presents, that we, the undersigned ..... as principal and ..... as sureties, are hereby held and firmly bound unto ..... in the penal sum of ..... dollars, for the payment of which well and truly to be made, we hereby jointly and severally bind ourselves, our heirs, executors, administrators, successors and assigns.

"Signed this ..... day of ....., 19....

"The condition of the above obligation is such that whereas, the above named principal did on the ..... day of ....., 19..., enter into a contract with ..... which said contract is made a part of this the bond the same as though set forth herein;

"Now, if the said ..... shall well and faithfully do and perform the things agreed by ..... to be done and performed according to the terms of said contract, and shall pay all lawful claims of subcontractors, materialmen, laborers, persons, firms or corporations for labor performed or materials, provisions, provender or other supplies or teams, fuels, oils, implements or machinery furnished, used or consumed in the carrying forward, performing or completing of said contract, we agreeing and assenting that this undertaking shall be for the benefit of any subcontractor, materialman, laborer, person, firm or corporation having a just claim, as well as for the obligee herein; then this obligation shall be void; otherwise the same shall remain in full force and effect; it being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated.

"The said surety hereby stipulates and agrees that no modifications, omissions or additions in or to the terms of the said

contract or in or to the plans or specifications therefor shall in anywise affect the obligation of said surety on its bond."

Recovery of any claimant under the bond shall be subject to the conditions and provisions of this article to the same extent as if such conditions and provisions were fully incorporated in the form set forth above.

ARTICLE 13. MONEY PAID TO CONTRACTORS ON PUBLIC IMPROVEMENTS AS TRUST FUND

2A:44-148. Money paid to contractor trust fund for payment of claims

All money paid by the state of New Jersey or by any agency, commission or department thereof, or by any county, municipality or school district in the state, to any person pursuant to the provisions of any contract for any public improvement made between any such person and the state or any agency, commission or department thereof, or any county, municipality or school district in the state, shall constitute a trust fund in the hands of such person as such contractor, until all claims for labor, materials and other charges incurred in connection with the performance of such contract shall have been fully paid.

1996 AMENDMENTS (ADDITIONS INDICATED BY UNDERLINE, DELETIONS BY STRIKING)

2A:44-143. Additional bond for payment of claims for labor, material and supplies; waiver; extent of surety's obligation

a. (1) When public buildings or other public works or improvements are about to be constructed, erected, altered or repaired under contract, at the expense of the State or any contracting unit, as defined in section 2 of P.L.1971, c. 198 (C. 40A:11-2), or school district, the board, officer or agent

contracting on behalf of the State, contracting unit or school district, shall require delivery of the payment and performance bond issued in accordance with N.J.S. 2A:44-147 and otherwise, as provided for by law, with an obligation for the performance of the contract and for the payment by the contractor, ~~and by all subcontractors~~, for all labor performed or materials, provisions, provender or other supplies, teams, fuels, oils, implements or machinery used or consumed in, upon, for or about the construction, erection, alteration or repair of such buildings, works or improvements ~~and~~ provided by subcontractors or material suppliers in contract with the contractor, or subcontractors or material suppliers in contract with a subcontractor to the contractor, ~~or material suppliers to a contractor~~, which class of persons shall be the beneficiaries of the payment and performance bond. The board, officer or agent shall also require that all payment and performance bonds be issued by a surety which meets the following standards:

(a) The surety shall have the minimum surplus and capital stock or net cash assets required by R.S. 17:17-6 or R.S. 17:17-7, whichever is appropriate, at the time the invitation to bid is issued; and

(b) With respect to all payment and performance bonds in the amount of $850,000 or more, (i) if the amount of the bond is at least $850,000 but not more than $8.5 million, the surety shall hold a current certificate of authority, issued by the United States Secretary of the Treasury pursuant to 31 U.S.C. § 9305, that is valid in the State of New Jersey as listed annually in the United States Treasury Circular 570, except that if the surety has been operational for a period in excess of five years, the surety shall be deemed to meet the requirements of this subsubparagraph if it is rated in one of the three highest categories by an independent, nationally recognized United States rating company that determines the financial stability of insurance companies, which rating company or companies

shall be determined pursuant to standards promulgated by the Commissioner of Insurance by regulation adopted pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C. 52:14B-1 et seq.), and (ii) if the amount of the bond is more than $8.5 million, then the surety shall hold a current certificate of authority, issued by the United States Secretary of the Treasury pursuant to 31 U.S.C. § 9305, that is valid in the State of New Jersey as listed annually in the United States Treasury Circular 570 and, if the surety has been operational for a period in excess of five years, shall be rated in one of the three highest categories by an independent, nationally recognized United States rating company that determines the financial stability of insurance companies, which rating company or companies shall be determined pursuant to standards promulgated by the Commissioner of Insurance by regulation adopted pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C. 52:14B-1 et seq.). A surety subject to the provisions of subsubparagraph (ii) of this subparagraph which does not hold a certificate of authority issued by the United States Secretary of the Treasury shall be exempt from the requirement to hold such a certificate if the surety meets an equivalent set of standards developed by the Commissioner of Insurance through regulation which at least equal, and may exceed, the general criteria required for issuance of a certificate of authority by the United States Secretary of the Treasury pursuant to 31 U.S.C. § 9305. A surety company seeking such an exemption shall, not later than the 180th day following the effective date of P.L.1995, c. 384 ~~(N.J.S. 2A:143 et al.)~~, certify to the appropriate contracting unit that it meets that equivalent set of standards set forth by the commissioner as promulgated.

(2) When such contract is to be performed at the expense of the State and is entered into by the Director of the Division of Building and Construction or State departments designated by the Director of the Division of Building and Construction, the director or the State departments may: (a) establish for

that contract the amount of the bond at any percentage, not exceeding 100%, of the amount bid, based upon the director's or department's assessment of the risk presented to the State by the type of contract, and other relevant factors, and (b) waive the bond requirement of this section entirely if the contract is for a sum not exceeding $200,000.

(3) When such a contract is to be performed at the expense of a contracting unit or school district, the board, officer or agent contracting on behalf of the contracting unit or school district may: (a) establish for that contract the amount of the bond at any percentage, not exceeding 100%, of the amount bid, based upon the board's, officer's or agent's assessment of the risk presented to the contracting unit or school district by the type of contract and other relevant factors, and (b) waive the bond requirement of this section entirely if the contract is for a sum not exceeding $100,000.

b. A surety's obligation shall not extend to any claim for damages based upon alleged negligence that resulted in personal injury, wrongful death, or damage to real or personal property, and no bond shall in any way be construed as a liability insurance policy. Nothing herein shall relieve the surety's obligation to guarantee the contractor's performance of all conditions of the contract, including the maintenance of liability insurance if and as required by the contract. Only the obligee named on the bond, and any subcontractor performing labor or any subcontraitor or materialman providing materials for the construction, erection, alteration or repair of the public building, work or improvement for which the bond is required pursuant to this section, shall have any claim against the surety under the bond.

c. A board, officer or agent contracting, on behalf of the State, contracting unit or school district shall not accept more than one payment and performance bond to cover a single construction contract. The board, officer or agent may accept

a single bond executed by more than one surety to cover a single construction contract only if the combined underwriting limitations of all the named sureties, as set forth in the most current annual revision of United States Treasury Circular 570, or as determined by the Commissioner of Insurance pursuant to R.S. 17:18-9, meet or exceed the amount of the contract to be performed.

d. A board, officer or agent contracting on behalf of the State, contracting unit or school district shall not aceept a payment or performance bond unless there is attached thereto a Surety Disclosure Statement and Certification to which each surety executing the bond shall have subscribed. This statement and certification shall be complete in all respects and duly acknowledged according to law, and shall have substantially the following form:

SURETY DISCLOSURE STATEMENT AND CERTIFICATION

, surety(ies) on the attached bond, hereby certifies(y) the following:

(1) The surety meets the applicable capital and surplus requirements of R.S. 17:17-6 or R.S.17:17-7 as of the surety's most current annual filing with the New Jersey Department of Insurance.

(2) The capital (where applicable) and surplus, as determined in accordance with the applicable laws of this State, of the surety(ies) participating in the issuance of the attached bond is (are) in the following amount(s) as of the calendar year ended December 31, __ (most recent calendar year for which capital and surplus amounts are available), which amounts have been certified as indicated by certified public accountants (indicating separately for each surety that surety's capital and surplus amounts, together with the name and

address of the firm of certified public accounts that shall have certified those amounts):

_____
_____
_____
_____

(3) (a) With respect to each surety participating in the issuance of the attached bond that has received from the United States Secretary of the Treasury a certificate of authority pursuant to 31 U.S.C. § 9305, the underwriting limitation established therein and the date as of which that limitation was effective is as follows (indicating for each such surety that surety's underwriting limitation and the effective date thereof):

_____
_____
_____

(b) With respect to each surety participating in the issuance of the attached bond that has not received such a certificate of authority from the United States Secretary of the Treasury, the underwriting limitation of that surety as established pursuant to R.S.17:18-9 as of (date on which such limitation was so established) is as follows (indicating for each such surety that surety's underwriting limitation and the date on which that limitation was established):

_____
_____
_____
_____

(4) The amount of the bond to which this statement and certification is attached is $_____.

(5) If, by virtue of one or more contracts of reinsurance, the amount of the bond indicated under item (4) above

exceeds the total underwriting limitation of all sureties on the bond as set forth in items (3)(a) or (3)(b) above, or both, then for each such contract of reinsurance:

(a) The name and address of each such reinsurer under that contract and the amount of that reinsurer's participation in the contract is as follows:

_____

_____

_____

_____; and

(b) Each surety that is party to any such contract of reinsurance certifies that each reinsurer listed under item (5)(a) satisfies the credit for reinsurance requirement established under P.L.1993, c. 243 (C.17:51B-1 et seq.) and any applicable regulations in effect as of the date on which the bond to which this statement and certification is attached shall have been filed with the appropriate public agency.

CERTIFICATE
(to be completed by an authorized certifying agent
for each surety on the bond)

I (name of agent) , as (title of agent) for (name of surety) a corporation/mutual insurance company/other (indicating type of business organization) (circle one) domiciled in (state of domicile) , DO HEREBY CERTIFY that, to the best of my knowledge, the foregoing statements made by me are true, and ACKNOWLEDGE that, if any of those statements are false, this bond is ~~VOID~~ VOIDABLE.

_____
(Signature of certifying agent)

_____
(Printed name of certifying agent)

(Title of certifying agent)

Amended by L.1989, c. 316, § 1, eff. Jan. 12, 1990; L.1991, c. 454, § 1, eff. Jan. 18, 1992; L.1995, c. 38, § 2, eff. March 7, 1995; L.1995, c. 384, § 1, eff. Jan. 10, 1996; L.1996, c. 81, § 2, eff. Aug. 24, 1996.

2A:44-144. Sureties on and amount of bond; condition for payment of claims; bond deposited and held for use of interested parties

The bond required by this article shall be executed by the contractor with such sureties in accordance with N.J.S. 2A.44-147 as shall be approved by the board, officer or agent acting on behalf of the state, contracting unit or school district, in an amount equal to ~~at least~~ 100 per cent of the contract price~~, and~~. The payment bond shall be conditioned for the payment by the contractor~~, and be all subcontractors, or his or their subcontractor,~~ of all indebtedness which may accrue to any person, firm or corporation designated as a "beneficiary" pursuant to N.J.S. 2A:44-143, in an amount not exceeding the sum specified in the bond, on account of any labor performed or materials, provisions, provender or other supplies, or teams, fuels, oils, implements or machinery used or consumed in, upon, for or about the construction, erection, alteration or repair of the public building or public work or improvement.

The payment bond shall be deposited with and be held by the board, officer or agent acting on behalf of the state, contracting unit or school district, for the use of ~~any party interested therein~~ any beneficiary thereof.

Amended by L.1995, c. 384, § 2, eff. Jan. 10, 1996; L.1996, c. 81, § 3, eff. Aug. 24, 1996.

2A:44-145. Statements of claimants filed with sureties on bond; time for action on bond

Any person who may be a beneficiary of the payment bond, as defined in this article, and who does not have a direct contract with the contractor furnishing the bond shall, prior to commencing any work, provide written notice to the contractor by certified mail or otherwise, provided that he shall have proof of delivery of same, that said person is a beneficiary of the bond. If a beneficiary fails to provide the required written notice, the beneficiary shall only have rights to the benefits available hereunder from the date the notice is provided.

Any ~~person~~ beneficiary, as defined in N.J.S. 2A:44-143, to whom any money shall be due on account of having performed any, labor or furnished any materials, provisions, provender or other supplies, or teams, fuels, oils, implements or machinery in, upon, for or about the construction, erection, alteration or repair of any public building or other public work or improvement, shall, at any time before the ~~acceptance of such building, work or improvement by the duly authorized board or officer, or within 80 days thereafter~~ expiration of one year from the last date upon which such beneficiary shall have performed actual work or delivered materials to the project, in the case of a material supplier, furnish the sureties on the bond required by this article a statement of the amount due to him.

No action shall be brought against any of the sureties on the bond required by this article until the expiration of ~~80~~ 90 days after ~~the acceptance of the building, work or improvement by the duly authorized board or officer~~ provision to the sureties and the contractor of the statement of the amount due to him, but in no event later than one year from the last date upon which such beneficiary shall have performed actual work or delivered materials to the project.

Amended by L.1996, c. 81, § 4, eff. Aug. 24, 1996.

2A:44-146. Limitation of action on bond

If the indebtedness due to any person as shown by the statement required to be filed by ~~section~~ N.J.S. 2A:44-145 ~~of this title~~ shall not be paid in full at the expiration of ~~80~~ 90 days from the ~~acceptance of the building, work or improvement by the duly authorized board or officer~~ date of notice of the amount due to the person, such person ~~may~~ shall, within 1 year from the ~~date of such acceptance~~ last date that work was performed or materials supplied by that person, bring an action in his own name upon the bond required by this article.

Amended by L.1996, c. 81, § 5, eff. Aug. 24, 1996.

2A:44-147. Form of and conditions in bond

The bond required by this article shall be in substantially the following form:

"Know all men by these presents, that we, the undersigned as principal and as sureties, are hereby held and firmly bound unto in the penal sum of dollars, for the payment of which well and truly to be made, we hereby jointly and severally bind ourselves, our heirs, executors, administrators, successors and assigns.

"Signed this ..... day of ..... ,19....

"The condition of the above obligation is such that whereas, the above named principal did on the ..... day of 19 ... , enter into a contract with ..... which said contract is made a part of this the bond the same as though set forth herein;

"Now, if the said ..... shall well and faithfully do and perform the things agreed by ..... to be done and performed according to the terms of said contract, and shall pay all lawful claims of ~~subcontractors, materialmen, laborers, persons, firms or corporations~~ beneficiaries as defined by N.J.S. 2A:44-143 for labor performed or materials,

provisions, provender or other supplies or teams, fuels, oils, implements or machinery furnished, used or consumed in the carrying forward, performing or completing of said contract, we agreeing and assenting that this undertaking shall be for the benefit of any ~~subcontractor, materialman, laborer, person, firm or corporation~~ beneficiary as defined in N.J.S. 2A:44-143 having a just claim, as well as for the obligee herein; then this obligation shall be void; otherwise the same shall remain in full force and effect; it being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated.

"The said surety hereby stipulates and agrees that no modifications, omissions or additions in or to the terms of the said contract or in or to the plans or specifications therefor shall in anywise affect the obligation of said surety on its bond."

Recovery of any claimant under the bond shall be subject to the conditions and provisions of this article to the same extent as if such conditions and provisions were fully incorporated in the form set forth above.

Amended by L.1996, c. 81, § 6, eff. Aug. 24, 1996.

Not Reported in F.Supp.

(Cite as: 1991 WL 537068 (W.D.Wash.))

PUGET SOUND ELECTRICAL WORKERS HEALTH & WELFARE TRUST FUND, et al., Plaintiffs,

v.

LEAF CORPORATION, INC., et al., Defendants.

No. C91-1312R.

United States District Court, W.D. Washington, at Seattle.

Oct. 31, 1991.

Kirk Robert McKenzie, Donaldson, Kiel & McKenzie, Seattle, WA, for plaintiffs.

Larry B. Feinstein, Feinstein & Bull, Benjamin Michael Schestopol, Oles, Morrison & Rinker, Seattle, Mary E. Fairhurst, Atty. Gen. Office, Olympia, WA, for defendants.

ORDER GRANTING PLAINTIFFS' MOTION TO REMAND TO STATE COURT

ROTHSTEIN, Chief Judge.

*1 THIS MATTER comes before the court on plaintiffs' motion to remand to Washington state court. Having reviewed the motion, together with all documents in support and in opposition, and being fully advised, the court finds and rules as follows:

I. FACTUAL BACKGROUND

This action arises out of two highway construction projects. Plaintiffs are employee health and welfare trust funds created pursuant to section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c). Defendant Kiewit Pacific

Company is a general contractor. Defendant Aetna Casualty and Surety Company is Kiewit's surety. Defendant Leaf Corporation is a subcontractor.

The Washington State Department of Transportation contracted with Kiewit for work on the Tukwila-to-South Renton HOV lanes and I-90 Seattle Transit Access Phase I projects. Leaf Corporation performed subcontracting work on the projects. Leaf Corporation is a party to a collective bargaining agreement with International Brotherhood of Electrical Workers Local Union No. 46. Under that agreement, Leaf Corporation is required to make monthly benefit contributions to plaintiffs on behalf of employees of Leaf Corporation. See Collective Bargaining Agreement, paragraph 4.03(a).

Pursuant to bond agreements between Kiewit and Aetna, Aetna is surety for the benefit contributions to be paid to plaintiffs by Leaf Corporation. These bonds are required by Wash.Rev.Code § 39.08.010.[1] Pursuant to Wash.Rev.Code § 60.28.010, a retainage has been withheld from Kiewit by the Washington State Department of Transportation.[2]

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[1] Wash.Rev.Code § 39.08.010 provides in pertinent part that: Whenever any . . . body acting for the state . . . shall contract with any person or corporation to do any work for the state, . . . such . . . body shall require the person or persons with whom such contract is made to make, execute, and deliver to . . . body a good and sufficient bond, with surety company as surety. . . .

[2] Wash.Rev.Code § 60.28.010 provides in pertinent part: Contracts for public improvements . . . by the state . . . shall provide, and there shall be reserved by the public body from the moneys earned by the contractor on estimates during progress of the improvement or work, a sum not to exceed five percent, said sum to be retained by the state as a trust fund for the protection and payment of anyperson or persons who shall perform any labor upon such contract. Ever person performing labor or furnishing supplies toward completion of aid improvement or work shall have a lien upon said moneys so reserved.

Plaintiffs allege that Leaf Corporation failed to make monthly contributions for employees who performed labor on the projects. On March 12, 1991, a default judgment in the amount of $41,518.89 was entered in Washington state court in favor of plaintiffs against defendant Leaf Corporation. See Default Judgment, exhibit 2 to plaintiff's reply memorandum.

On May 20, 1991, plaintiffs filed notices of claims with the Washington State Department of Transportation, pursuant to Wash.Rev.Code § 60.28.010. On August 15, 1991, plaintiffs were granted relief from stay in defendant Leaf Corporation's bankruptcy proceedings, in order to proceed against Leaf as a nominal defendant. On September 6, 1991, plaintiffs commenced actions in Washington state court against Leaf, Kiewit, and Aetna to foreclose on the claims. On September 20, 1991, defendants removed to federal court. On October 8, 1991, this court consolidated the actions.

Plaintiffs now move to remand the case to state court on the ground that this court lacks subject matter jurisdiction. Plaintiffs seek attorney's fees incurred in bringing the motion.

Defendants argue that the district court has subject matter jurisdiction because: (1) plaintiffs' claims are completely preempted by federal law; and (2) the court has pendant jurisdiction over plaintiffs' claims against Kiewit and Aetna by virtue of Leaf Corporation's independent removal.

II. DISCUSSION

*2 This court should deny a motion to remand if the case was properly removed to federal court under 28 U.S.C. § 1441. Carpenters So. Cal. Admin. Corp. v. Majestic Housing, 743 F.2d 1341, 1343 (9th Cir.1984). An action is removable only if it originally could have been filed in federal court. See Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987). In the absence of diversity of citizenship, federal question jurisdiction is required. Caterpillar, 482 U.S. at 392.

The parties bring before the court two different standards for determining whether federal question jurisdiction exists. In order to determine whether this lawsuit must be remanded, the court must decide which standard controls under the circumstances of the case.

On one hand, the presence or absence of federal question jurisdiction is governed by the "well pleaded complaint rule," which provides that federal question jurisdiction exists only when a federal question is presented on the face of plaintiffs well pleaded complaint. Id. Plaintiff may avoid federal jurisdiction by exclusive reliance on state law. Id.

Plaintiffs argue that their claims are governed exclusively by Washington state law, Wash.Rev.Code §§ 39.08.010 et. seq., & §§ 60.28.010 et. seq., and that pursuant to the well pleaded complaint rule, the case must be remanded.

On the other hand, under the "complete preemption doctrine," the pre-emptive force of a federal statute may be so "extra-ordinary" that it "converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." Caterpillar, 482 U.S. at 393 (quoting Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987). See also Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for So. Cal., 463 U.S. 1, 24 (1983) (if federal cause of action completely pre-empts state cause of action, any complaint that comes within scope of federal cause of action arises under federal law).

Defendants argue that plaintiffs' claims are completely preempted under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), and section 514(a) of the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a).

1. Preemption under LMRA § 301

Section 301 of the Labor Management Relations Act completely pre-empts a state law claim if resolution of the claim

depends upon interpretation of a collective bargaining agreement.[3] See Lingle v. Norge Div. Magic Chef, 486 U.S. 399, 405-06 (1988). See also United Steelworkers of America v. Rawson, 110 S.Ct. 1904, 1910 (1990) (determination of plaintiff's claim that union negligently inspected mine depended on interpretation of collective bargaining agreement); Stikes v. Chevron, U.S.A., Inc., 914 F.2d 1265, 1269 (9th Cir.1990), cert. denied, 111 S.Ct. 2015 (1991) (determination of plaintiff's right-to-privacy claim depended on interpretation of collective bargaining agreement). The purpose of the doctrine is to encourage application of uniform federal labor-law principles to the interpretation of collective bargaining agreements. See Lingle, 486 U.S. at 399.

*3 Not every dispute involving a provision of a collective bargaining agreement is preempted by section 301. Lingle, 486 U.S. at 413 n. 12 (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985)). See also Gulden v. Crown Zellerbach Corp., 890 F.2d 195, 198-99 (9th Cir.1989) (plaintiffs claim that ordering him to clean up a PCB spill constituted fraud did not turn upon interpreting collective bargaining agreement). A plaintiff covered by a collective bargaining agreement is permitted to assert state law contract rights, so long as the contract relied upon is not a collective bargaining agreement. Caterpillar, 482 U.S. at 396.

Although plaintiffs' right to contributions from the employer is created by the collective bargaining agreement, resolution of plaintiffs' state law claims will not require interpretation of that agreement. Leaf Corporation's obligation to

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[3] Section 301 of the LMRA, 29 U.S.C. § 185(a) provides: Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without regard to the citizenship of the parties.

make contributions is established by a valid state court judgment. See Default Judgment, exhibit 2 to plaintiffs' reply memorandum. Had Leaf seriously intended to contest its obligation under the collective bargaining agreement, it had the opportunity to do so in the state court proceeding.

The validity of the state court judgment was recognized by the Bankruptcy Court when that court granted plaintiffs relief from the automatic stay to pursue this action against defendants. See Order of Bankruptcy Court granting relief from stay, entered August 15, 1991, exhibit 1 to plaintiffs' reply memorandum. Notably, the relief from stay includes Leaf as a nominal defendant only.[4]

This case is controlled by Ninth Circuit precedent that section 301 does not preempt a state law action by a pension fund against a general contractor to foreclose on a state law lien created when the subcontractor failed to contribute to the fund. See Carpenters So. Cal. Admin. Corp. v. Majestic Housing, 743 F.2d at 1341, 1343 (9th Cir.1984). Although defendants argue that Majestic Housing has been effectively overruled by subsequent Supreme Court precedent, they present no authority to that effect. The applicable standard now, as in 1984 when Majestic Housing was decided, is that section

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[4] The court is unpersuaded by the various hypothetical questions involving the collective bargaining agreement, which defendants argue will arise in this case. See Defendants' memorandum in support of removal and in opposition to remand, page 4, footnote 1. The court will not have to determine whether the work performed was "covered." See id. There will not be a question as to whether the employer's liability continues if the employer becomes insolvent. The court rejects defendant's argument that because plaintiffs seek relief in an amount different from the sum granted in the default judgment, the case is preempted under the LMRA. The amount to which plaintiffs are entitled is a matter to be resolved by the state court. The question does not require application of uniform federal labor law. See Lingle, 486 U.S. at 413 n. 12 (underlying state law claim not otherwise preempted stands even if collective bargaining agreement is referred to for information in determining damages in state law action).

301 preempts a state law claim if resolution of the claim requires interpretation of a collective bargaining agreement. See Lingle, 486 U.S. at 405-06.

Ninth Circuit cases finding preemption have involved claims that were brought by an employee against its employer, and that turned on interpretation of a collective bargaining agreement. See e.g. Stikes, 914 F.2d at 1266 (employee's action against employer, alleging breach of privacy); Jackson v. Southern Cal. Gas Co., 881 F.2d 638, 640 (9th Cir.1989) (employee action against employer, alleging racial discrimination); Chmiel v. Beverly Wilsire Hotel Co., 873 F.2d 1283, 1286-87 (9th Cir.1989) (employee action against employer, alleging wrongful termination).

This case does not involve a claim brought by an employee against its employer, and does not turn on interpretation of the bargaining agreement. The court therefore holds that the case is not preempted under section 301 of the LMRA.

2. Preemption under ERISA § 514(a)

*4 Section 514(a) of ERISA provides that "the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." A state law which is specifically designed to affect employee benefit plans is preempted under section 514(a). Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825, 829 (1988).

ERISA preemption is not limited to state law that is specifically designed to affect such plans. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98 (1983). Whatever the underlying intent of the state law, if the law has a "connection with or reference to" a benefit plan, it "relates to" such a plan. Id. at 96-7. The Ninth Circuit has held that a state statute which confers on a pension trust fund a lien for unpaid benefits contributions is preempted under ERISA. Sturgis v. Herman

Miller, Inc., No. 90-15054, slip op. at 12287 & 12289 (9th Cir. September 3, 1991).

The Supreme Court has held that a general state law enforcement mechanism for recovery of a judgment is not preempted under ERISA section 514(a). Mackey, 486 U.S. at 838 (Congress did not intend to preclude state-law attachment of ERISA welfare plan benefits). The reason for the Court's holding in Mackey was that ERISA contemplates that benefits plans may be sued in civil actions, but does not provide an enforcement mechanism for collecting judgments won in lawsuits against ERISA plans. See Mackey, 486 U.S. at 833.

The state statutes relied upon by plaintiffs in this case are analogous to the general state law attachment provision upheld in Mackey. If plaintiffs are not permitted to proceed under the state law foreclosure statute, they cannot collect the proceeds of the liens. Plaintiffs' state law lien foreclosure claims against defendants Kiewit; Aetna; and the State Retainage Bond therefore are not preempted under ERISA. See Mackey, 486 U.S. at 833; Majestic Housing, 743 F.2d at 1346 (action against general contractor responsible under state law for failed obligations of employer not preempted under ERISA).

Plaintiffs name the employer Leaf Corporation as a nominal defendant only. They do not seek monetary relief from the employer.[5] Because plaintiffs state no additional claims for relief against Leaf, inclusion of Leaf as a nominal defendant is not a basis for preemption under ERISA.

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[5] If plaintiffs sought monetary relief from Leaf, the claim possibly would be preempted since ERISA provides a civil enforcement mechanism for a benefit plan to enforce an employer's statutory obligation to make contributions to the plan. See 29 U.S.C. § 1145; 29 U.S.C. § 1132(a)(3).

The court hereby concludes that plaintiffs' claims brought pursuant to Wash.Rev.Code § 60.28.010 and Wash.Rev.Code § 39.08.010 are not preempted under ERISA section 514(a).

3. Pendant Jurisdiction

Leaf Corporation has petitioned for removal independently of Kiewit and Aetna. Defendant argues that because the court has subject matter jurisdiction over claims against Leaf, it also has pendant jurisdiction over plaintiffs' claims against Kiewit and Aetna pursuant to 28 U.S.C. § 1367.

The argument is meritless. At Leaf's insistence, the Bankruptcy Court order granting relief from automatic stay sets forth that Leaf is a nominal defendant only. As discussed above with respect to the question of preemption under the LMRA and ERISA, Leaf's obligation to make contributions to plaintiffs was determined by the default judgment in state court. Plaintiffs assert no additional claims against Leaf in this action. Inclusion of Leaf in this action as a nominal defendant is not a basis for exercising subject matter jurisdiction over the case.

*5 NOW, THEREFORE, it is ORDERED as follows:

1. Plaintiffs' motion to remand to state court is GRANTED.

2. Plaintiff will be awarded attorney's fees upon substantiation of the amount requested.

ORDER GRANTING MOTION FOR RECONSIDERATION; VACATING ORDER OF REMAND TO STATE COURT; AND DISMISSING PLAINTIFFS' COMPLAINT

THIS MATTER comes before the court on defendants' motion for reconsideration of the court's order granting plaintiffs' motion to remand. Having reviewed the motion,

together with all documents in support and opposition, and being fully advised, the court finds and rules as follows:

I. FACTUAL BACKGROUND

On September 6, 1991, plaintiffs commenced actions against defendants in Washington state court, seeking foreclosure on claims for pension fund contributions pursuant to Wash.Rev.Code § 60.28.010. On September 20, 1991, defendants removed to federal court. On October 8, 1991, this court consolidated the actions.

On September 26, 1991, plaintiffs moved to remand to state court. On October 31, this court granted plaintiffs' motion. Defendants now move for reconsideration of the court's order granting plaintiffs' motion to remand.

Defendants argue that section 514(a) of the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a), completely preempts plaintiffs' claims. Plaintiffs argue that their claims are not preempted under ERISA.

II. DISCUSSION

A motion for reconsideration must present facts or legal arguments not initially presented to the court. The absence of any new argument on reconsideration requires denial of the motion. Taylor v. Knapp, 871 F.2d 803, 805 (9th Cir.1989), cert. denied, 493 U.S. 868 (1989). See also Backland v. Barnhart, 778 F.2d 1386, 1388 (9th Cir.1985).

Defendants argue that the state lien statute relied upon by plaintiffs, Wash.Rev.Code § 60.28.010, creates a substantive cause of action in favor of an ERISA benefit plan trustee. Defendants contend that because the state law creates a substantive remedy, plaintiffs' claims under the law are preempted under ERISA section 514(a).

This court must determine whether the state lien statute confers a substantive cause of action, or a procedural remedy

analogous to the general garnishment statute at issue in Mackey v. Lanier Collections Agency, 486 U.S. 825, (1988) (state law garnishment statute was merely an enforcement mechanism, and therefore was not preempted under ERISA). Mackey held that since money judgments against ERISA welfare benefit plans somehow must be collected, and since ERISA does not provide a method for collecting such judgments, state law methods are not preempted. 486 U.S. at 834. Mackey did not carve out a broad exception to federal ERISA preemption for state procedural law. Rather, the exception was limited to the state garnishment law at issue in the case.

Plaintiffs argue that because the Washington state lien statute does not specifically refer to ERISA benefit plans, it is analogous to the garnishment statute in Mackey. However, this court cannot base its determination regarding preemption on whether the state statute explicitly refers to benefit plans. Although the lien statute does not specifically refer to benefit plans, the Washington Supreme Court has held that pursuant to that statute, a plan trustee can sue the surety for contributions owed the plan. See Crabtree v. Lewis, 86 Wash.2d 282, 286, 544 P.2d 10 (1975). Under ERISA section 514(a), state decisional law relating to benefit plans, as well as statutory law, is preempted. See 29 U.S.C. § 1144(a) ("State law" includes all law, decisions, rules, regulations, or other State action having the effect of law). Thus, if a state statute creates a substantive remedy that has been interpreted to "relate to" a benefit plan, the fact that the statute does not specifically mention pension plans will not enable plaintiffs to avoid preemption.

*6 There is authority that a state lien statute creates a substantive remedy. See Iron Workers Pension Fund v. Terotechnology, 891 F.2d 548, 554 (5th Cir.), cert. denied, 110 S.Ct. 3272 (1990) (since plan trustee would not be entitled to sue Borden, owner of facility which contracted for maintenance work, in absence of state lien statute, the statute conferred a

substantive right against Borden not created by ERISA). Whereas the garnishment law in Mackey did not impose liability on any party who would not have been liable in the absence of the law, the state law in this case does extend liability to additional parties: the contractor and the surety. Because these parties' liability to plaintiffs derives from the Washington state lien statute, the court concludes that the statute "relates to" a benefit plan under ERISA section 514(a), and therefore is preempted.

The court rejects plaintiffs' argument that their action is simply a procedural mechanism for collecting the default judgment already pending against defendant Leaf Corporation. The default judgment was entered only against Leaf Corporation. The extension of liability to defendants Kiewit and Aetna can be accomplished only by reference to the Washington state lien law and Crabtree, 86 Wash.2d at 282, which as set forth above, are preempted under ERISA section 514(a).

This holding is consistent with the recent Ninth Circuit decision in Sturgis v. Herman Miller, Inc., 943 F.2d 1127, 1130 (9th Cir.1991) (state statute which confers on a pension trust fund a lien for unpaid benefits contributions is preempted under ERISA).

The statute at issue in Sturgis specifically referred to benefit plans, while the Washington state statute at issue in this case does not. However, as set forth above, the Washington Supreme Court has interpreted the statute to confer a cause of action on a pension plan trustee. That decisional law is preempted under ERISA section 514(a).

Under the ERISA enforcement provisions, plaintiffs are not authorized to sue Kiewit and Aetna in federal court. See 29 U.S.C. §§ 1132(a)(3)(B)(ii) and 1145. ERISA provides for a civil action by the trustee against the employer. See 29 U.S.C. § 1145. Neither Kiewit nor Aetna qualifies as an "employer"

within section 1145. See Terotechnology, 891 F.2d at 555; Carpenters Southern California Admin. Corp. v. Majestic Housing, 743 F.2d 1341, 1345 (9th Cir.1984). Accordingly, plaintiffs' action must be dismissed.

NOW, THEREFORE, it is ORDERED as follows:

(1) Defendants' motion for reconsideration is GRANTED;

(2) This court's October 31, 1991 order granting plaintiffs' motion to remand to state court and assessing attorney's fees is VACATED.

(3) Plaintiffs' motion to remand is DENIED.

(4) Plaintiffs' complaint is DISMISSED.

(5) Each party will bear its costs.

FILED
UNITED STATES
DISTRICT COURT
DENVER COLORADO

AUG 4 1995
JAMES R.
MANSPEAKER
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action NO. 95-WY-1092-CB

TRUSTEES OF THE COLORADO PIPE INDUSTRY INSURANCE FUND, an express trust, et al.,

Plaintiffs,

v.

APACHE PLUMBING/CONSTRUCTION CORP., a Colorado corp., at al.

Defendants.

ORDER DENYING PLAINTIFFS' MOTION TO REMAND

This matter comes before the Court on the Plaintiffs' Motion to Remand, and defendants' opposition thereto, and the Court, having considered the materials on file herein, having heard the oral arguments of the parties, and being fully advised in the premises, hereby FINDS and ORDERS as follows:

Background

Plaintiffs are a group of union trust funds trustees seeking to recover employee benefits which Defendant Apache Plumbing allegedly failed to pay union members. The suit arises from a construction project for the Denver Public Schools, where Defendant Apache worked as a subcontractor. Defendant Construction Management & Technical Services (hereinafter "CMTS") was the general contractor on the school project. Defendant International Fidelity provided a

bond for CMTS on the project, as required by state law. CMTS states that it made payment in full to Apache for all amounts due Apache under the subcontract, but the plaintiffs allege that Apache failed to make benefit contributions to a number of Apache's union employees.

Prior to bringing this action, the plaintiffs filed suit against Apache in the United States District Court for the District of Colorado under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* In that suit, plaintiffs also sought to recover unpaid benefit contributions related to the same school project. Apache defaulted in that lawsuit, and the plaintiffs filed a Motion for Default judgment. However, on May 11, 1995, Apache filed for bankruptcy, resulting in an automatic stay of the default proceedings.

Plaintiffs bring the instant suit seeking to recover amounts which they requested in the earlier ERISA suit. Plaintiffs base their complaint on the Colorado Public Works Contractor's Bond statutes, C.R.S. §§ 38-26-105-106, seeking payment from CMTS as the general contractor and from International Fidelity as its surety. Plaintiffs also sue Denver School District No. 1 as stakeholder of funds on the school project under C.R.S. 38-26-107.

Plaintiffs originally brought the instant action in state district court in Colorado. The defendants then removed this case to this Court, on grounds that the state law claims are pre-empted by ERISA. Plaintiffs now seek remand, arguing that their complaint asserts only state law claims, does not present any federal question, and is not pre-empted by ERISA. For the reasons outlined below, the Court finds that the plaintiffs' claims are pre-empted by ERISA and thus denies the plaintiffs' Motion to Remand.

Pre-emption Under ERISA

As an initial matter, this court must consider whether it has subject matter jurisdiction to make the threshold decision whether this case is pre-empted by ERISA. Plaintiffs contend

that jurisdiction must be based upon their complaint, and that because their complaint contains no federal claims for relief, the Court lacks subject matter jurisdiction. This argument invokes the "well-pleaded complaint rule," which basically states that a federal cause of action arises only when the plaintiff's well-pleaded complaint raises issues of federal law. Because federal pre-emption is ordinarily a defense to suit, it does not appear on the face of the complaint and thus, generally speaking, may not authorize removal to federal court. A major exception to the well pleaded complaint rule, however, arises when "Congress so . . . completely pre-empt[s] a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-4 (1986). The Tenth Circuit has ruled that the ERISA is an example of a body of law which is sufficient in power and scope to invoke federal question jurisdiction upon its presentation as pre-emptive defense. *Settles v. Golden Rule Ins. Co.*, 927 F.2d 505, 508 (10th Cir. 1991).

After carefully examining the plaintiffs' complaint, the Court finds that it alleges sufficient facts to legitimize defendants' invocation of ERISA pre-emption. The Court accordingly finds that it has jurisdiction under 28 U.S.C. § 1331 to determine whether this action is pre-empted by ERISA § 514 (a), 29 U.S.C. § 1144(a).

Section 514(a) of ERISA pre-empts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." According to the United States Supreme Court, the preemption discussed in Section 514 (a) "was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990). To this end, the Supreme Court has given the term "relate to" a broad interpretation.

> The pre-emption clause is conspicuous for its breadth. Its deliberately expansive language was designed to establish pension plan regulation as exclusively a federal concern. The key to § 514(a) is

> found in the words "relate to." Congress used those words in their broad sense, rejecting more limited pre-emption language that would have made the clause applicable only to state laws relating to the specific subjects covered by ERISA. Moreover, to underscore its intent that § 514(a) be expansively applied, Congress used equally broad language in defining the "State law" that would be pre-empted. Such laws include all laws, decisions, rules, regulations, or other State action having the effect of law.
>
> A law "relates to" an employee benefit plan, in the normal sense of the phrase if it has a connection with or reference to such a plan. Under this broad common-sense meaning, a state law may "relate to" a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect.

Ingersoll-Rand, 498 U.S. at 138-39 (citations and internal quotations omitted). On the other hand, while the scope of ERISA is broad, state law will not be pre-empted when it has only a "tenuous, remote, or peripheral" connection with covered plans, as is the case with many laws of general applicability. *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078, 1084 (10th Cir. 1994).

Discussion

The Tenth Circuit has not confronted the question whether a state construction bond statute may be used to collect unpaid ERISA benefits from non-employers, *i.e.*, general contractors and their sureties. Other courts, however, have discussed precisely this issue.

In a case remarkably similar to the case at bar, the Ninth Circuit had occasion to analyze the broad pre-emptive power of Section 514(a). In *Trustees of Elec. Workers Health and Welfare Trust v. Marjo Corp.*, 988 F.2d 865 (9th Cir. 1992), plaintiffs were the trustees of various ERISA benefit plans. Defendants included a subcontractor who was contractually

bound to make employee contributions, and several general contractors who used that subcontractor on their projects. When the subcontractor failed to make its obligatory benefit contributions, the trustees sued. The subcontractor then filed for bankruptcy, whereupon the trustees sought judgment under Nevada state law[1] to obtain the unpaid benefits from the general contractors. When the trustees filed suit against the general contractors in Nevada State court, the general contractors removed to federal court and moved for summary judgment on grounds that ERISA pre-empted the Nevada statute under which the trustees sued. The United States District Court for the District of Nevada agreed and granted summary judgment in the general contractor's favor.

In affirming the district court's decision, the Ninth Circuit opined:

> We agree with the district court that the Nevada statute making general contractors liable for subcontractors' benefit plan contributions is a statute "relate[d] to" benefit plans within the meaning of ERISA's pre-emption provision. We also agree with the district court's conclusion that it makes no difference that the Nevada statute was not "specifically designed to affect employee benefit plans." The Trustees are attempting to use the Nevada statute to enforce the terms of a plan. To the extent that the

---

[1] The statute in question, Nevada Revised Statute Section 608.150(1), provided as follows:

> Every original contractor making or taking any contract in this state for the erection, construction, alteration or repair of any building or structure, or other work, shall assume and is liable for the indebtedness for labor incurred by any subcontractor acting under, by, or for the original contractor in performing any labor, construction, or other work included in the subject of the original contract, for labor, and for the requirements imposed by [the Nevada Industrial Insurance Act].

Marjo, 988 F.2d at 866 n.1.

> enforcement mechanism of the Nevada statute supplements those provided by ERISA, it is pre-empted.
>
> . . . .
>
> No one questions that Congress intended to facilitate collection actions against employers. At the same time, there seems to be no support for concluding that Congress intended to allow each state to expand liability for contributions to ERISA plans as it sees fit.

Id., at 867-68. *See also*, *Carpenter's Health & Welfare Trust Fund for California v. Tri Capital*, 25 F.3d 849 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 580 (1994) (claim brought under California's statutory "bonded stop notice" for unpaid benefits against construction lender and prime contractor pre-empted by ERISA).

The facts of this case are also virtually identical to those of *Puget Sound Elec. Workers v. Merit*, 870 P.2d 960 (Wash. 1994).[2] In *Puget Sound*, plaintiffs were a group of union employee benefit trust funds who brought an action to collect employer contributions owed them by a subcontractor of the defendant general contractor, Merit Company. The plaintiff trusts, in a separate action against the subcontractor, had obtained a judgment for the unpaid employer contributions. However, because of the subcontractor's insolvency, the plaintiffs were unable to collect on the judgment. The plaintiffs then sought to use Washington's public works lien statutes to hold the general contractors or their surety liable for the subcontractor's unpaid contributions. Defendants moved for summary judgment on grounds that the state law claims were pre-empted by ERISA. The Washington state trial court

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[2] The Court acknowledges that *Puget Sound* is a state supreme court's opinion on a federal issue and thus only persuasive in its authority. However, after examining the case, the Court agrees with its reasoning and conclusion.

agreed and granted summary judgment in the defendants' favor. On appeal, the Washington Supreme Court affirmed[3]:

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[3] In reaching its holding, the Washington Supreme Court distinguished its case from *Mackey v. Lanier Collection Agency and Serv,. Inc.*, 486 U.S. 825 (1988), a case relied upon by the plaintiffs in the instant case. In *Mackey*, a creditor of several ERISA plan beneficiaries attempted to garnish money that the plan owed to those beneficiaries. The plaintiff's suit relied on Georgia's general garnishment statute, which the United States Supreme Court found were not pre-empted by ERISA. The *Mackey* Court, finding the state garnishment statute to be a procedural mechanism for enforcing judgments, stated:

> In our view . . . certain ERISA provisions, and several aspects of the statute's structure, indicate that Congress did not intend to forbid the use of state-law mechanisms of executing judgments against ERISA welfare benefit plans, even when those mechanisms prevent plan participants from receiving their benefits.
>
> . . . .
>
> [S]tate law methods for collecting money judgments must, as a general matter, remain undisturbed by ERISA; otherwise, there would be no way to enforce such a judgment won *against* an ERISA plan . . . It is thus clear enough that money judgments *against* ERISA welfare benefit plans, based on state or federal law, won in state or federal court, must be collectible in some way; garnishment is one permissible method.

Mackey, 486 U.S. at 831-32, 834 (emphasis added).

In distinguishing *Mackey* from *Puget Sound*, the Washington Supreme Court pointed out what this Court believes are the critical difference between the two cases:

> The Trusts argue that Washington's public works lien statutes, like the general garnishment statute in *Mackey,*, merely provide a procedural mechanism for ERISA funds to collect employer contributions. We disagree. Unlike the garnishment statute in *Mackey*, Washington's public works lien statutes create an entirely separate cause of action against the general contractors *who otherwise have no contractual obligation to the plans.* Furthermore, they provide a mechanism for funding

(Footnote continued)

> Washington's public works lien statutes create an entirely separate cause of action against the general contractors who otherwise have no contractual obligation to the plans. Furthermore, they provide a mechanism for funding employee benefits not available under the provisions of ERISA.
>
> By imposing liability upon general contractors who have not agreed to make contributions to ERISA funds, Washington's public works lien statutes regulate how ERISA plans are funded. Consequently, they relate to ERISA benefit plans and the provisions of ERISA that address the nonpayment of contributions by employers to employee benefit plans.

Puget Sound, 870 P.2d at 963-64.

The Court agrees with the reasoning of both *Marjo* and *Puget Sound*. In the case at bar, both parties agree that ERISA does not impose liability on Defendant CMTS or its surety, since neither are "employers" under the provisions of ERISA. The only employer in this case, and thus the only party exposed to liability under ERISA, is Defendant Apache. Apache, however, is bankrupt. By attempting to pursue CMTS and its surety under Colorado's construction bond statutes, plaintiffs seek to superimpose liability created by ERISA onto parties who do not fall within its reach. Such maneuver clearly affects the manner in which ERISA funds are collected and has the direct effect of supplementing the enforcement provisions of ERISA. Because the Colorado construction bond statutes -- as the plaintiffs attempt to use them

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> employee benefit plans not available under the provisions of ERISA.

Puget Sound, 870 P.2d at 963-64 (emphasis added).

in this case -- "relate to" the employee benefit plan in question, the plaintiffs' claims are pre-empted.[4]

Finally, in light of Apache's bankruptcy and its accompanying stay, the parties question whether these proceedings may be maintained as to co-defendants CMTS, International Fidelity and Denver School District No. 1.

The Tenth Circuit has "uniformly rejected" an interpretation of 11 U.S.C. § 362 which extends the reach of the bankruptcy stay to solvent co-defendants. *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1329 (10th Cir. 1984). The Tenth Circuit stated:

> It would make no sense to extend the automatic stay protections to solvent co-defendants. They don't need it, and at the same time it would work a hardship on plaintiffs by giving an unwarranted immunity from suit to solvent co-defendants. Extending the stay to protect solvent co-defendants would not advance . . . the purposes of the automatic stay. Accordingly, we join the other circuit courts in concluding that 11 U.S.C. § 362 stays

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[4] This matter is presented in an awkward procedural posture. The plaintiffs style their motion as a Motion to Remove, arguing that the action does not present a federal question. However, both parties focus a substantial amount of their attention on whether the state statutes -- upon which the case is entirely based – are pre-empted by ERISA. This is not only a federal question, but also goes to the survival of the entire case. Obviously, then, the Court's denial of the Motion to Remove, to the extent that it finds that the plaintiffs' claims are pre-empted by ERISA, necessarily equates to a finding that the plaintiffs may not pursue their claims further in either state or federal court.

Because the Court finds that it has jurisdiction to consider whether the plaintiffs' claims are pre-empted by ERISA, and because it further finds that the plaintiffs' claims are pre-empted by ERISA, it appears to the Court that the plaintiffs' suit is extinguished by this order. The Court will defer to the parties to submit the appropriate motions in accordance with this fact.

> litigation only against the debtor, and affords no protection to solvent co-defendants.

Id. at 1330.

Based on the above, the bankruptcy stay as to Defendant Apache does not extend to the solvent defendants in this case. These proceedings are thus property maintained as to those defendants.

THEREFORE, it is

ORDERED that the Plaintiffs' Motion to Remand be, and the same hereby is, **DENIED.**

Dated this 4th day of August, 1995.

/s/ [illegible]
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
AUG 28 1997
CLERK

No. 97-70

In The

Supreme Court of the United States

October Term, 1996

INTERNATIONAL FIDELITY INSURANCE COMPANY, a New Jersey Corporation,

Petitioner,

vs.

BOARD OF TRUSTEES OF OPERATING ENGINEERS LOCAL 825 FUND SERVICE FACILITIES,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Employee Retirement Income Security Act of 1974 ("ERISA") preempt provisions of the New Jersey Public Works Bond Act, N.J.S.A. 2A:44-143 to 147 (the "Bond Act"), a generally applicable state law that functions without any reference to ERISA, which law requires contractors to post bonds for payment for labor performed on public works projects, thereby rendering the issuing surety liable for unpaid pension fund contributions?

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RELEVANT STATUTORY PROVISIONS

The statutory provisions relevant to this matter include the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), *et seq.*, and the New Jersey Public Works Bond Act, N.J.S.A. 2A:44-143, *et seq.*

STATEMENT OF THE CASE

Respondent Board of Trustees of Operating Engineers Local 825 Fund Services Facilities (the "Trustees") are the Trustees of a union benefits fund, and are responsible to collect union benefit contributions (pension, welfare, medical, etc.) from employers of union laborers pursuant to Collective Bargaining Agreements.

Petitioner International Fidelity Insurance Company ("IFIC") issued Labor and Material Payment Bonds (the "Surety Bonds") to the employer-contractor on various public construction projects throughout New Jersey. The Surety Bonds required IFIC to "pay all lawful claims of subcontractors, materialmen, laborers, persons, firms or corporations for labor performed or materials, provisions . . . used or consumed" and "for labor, materials, or both, used or reasonable required for use in the performance of the contract . . ." in the event the employer failed to make such payments." Surety Bond ## 898727, 898730, 898687.

When the employer failed to make adequate benefit contributions for its union laborers, the Trustees instituted legal action against it and obtained a default judgment for $95,612.53. After an unsuccessful attempt to collect on its judgment, the Trustees instituted legal action against IFIC seeking payment for said contributions pursuant to the express terms of the Surety Bonds.

Issuance of and collection procedures against the Surety Bonds are regulated by the New Jersey Public Works Bond Act, N.J.S.A. 43:44-143, *et seq.* (the "Bond Act"). The Bond Act requires the public agent in charge of public works projects to require surety bonds to insure payment to all laborers and suppliers.[1] The New Jersey Supreme Court noted that the Act was designed to protect public agencies, laborers, and material suppliers who work on public projects from the insolvency of a general contractor. A-16. The court also noted the following with regard to the Bond Act:

— The Bond Act has existed in various forms for almost eighty years, long before congress adopted ERISA. A.16

— The Bond Act is a generally applicable law that functions without any reference to ERISA. A.16

— The Bond Act is both ERISA-neutral and union-neutral. A.15.

---

1. The Bond Act, in pertinent part states:

> a. When public buildings or other public works or improvements are about to be constructed, erected, altered or repaired under contract, at the expense of the State or any county, municipality or school district thereof, the board, officer or agent contracting on behalf of the State, . . . shall require the usual bond as provided for by law, with good and sufficient sureties, with an additional obligation for the payment by the contractor, and by all subcontractors, for all labor performed or materials, provisions, provender or other supplies, teams, fuels, oils, implements or machinery used or consumed in, upon, for or about the construction, erection, alteration or repair of such buildings, works or improvements.

N.J.S.A. 2A:44-143(a). A.32.

— The Bond Act does not frustrate ERISA's goal of uniform plan administration. A.16

— The Bond Act does not conflict with ERISA enforcement mechanisms A.16, and

— The Bond Act does not touch upon any of the rights or duties incident to ERISA plans. A.16.

Both the New Jersey Supreme Court and the Appellate Division below, recognized, as a matter of law, that the:

> surety bonds guarantee[d] both performance of the work and the full payment for labor and materials supplied on the jobs.

(A.3), and that coverage under the Surety Bonds included both wage and benefit elements of "labor." A.17-18, A.30. The New Jersey Supreme Court noted:

> [h]istorically, payments for all "labor performed" have been considered to include more than wages.[2] Sureties in New Jersey were aware of a practice of including fringe benefits within the definition of wages.[3]

A.17-18.

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2. Citing: *United States ex rel. Sherman v. Carter*, 353 U.S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776 (1957) (holding Miller Act provision insuring employer payment of "sums justly due" for labor performed not limited to wages).

3. Citing: *Newark Laborers' Pension-Welfare Funds v. Commercial Union Ins. Co.*, 126 N.J. Super. 1, 312 A.2d 649 (App. Div. 1973) (noting surety had paid benefit contributions owed, and holding that costs and attorney's fees were recoverable against surety in action to collect an employer's delinquent contributions).

In light of the undisputed state of the law, we object to IFIC's Statement of the Case that ". . . in order to prevail the Trustees must establish that the Bond Act requires the surety to guarantee direct labor expense and also any outstanding contributions owed to labor union pension funds" and that "the Union did not require Gram to furnish benefit bonds and thereby protect its members' interest in receiving the appropriate contribution." Petition ("Pet.") at p 3. We note however, that the parameters of coverage under the Surety Bonds is irrelevant for purposes of the preemption analysis in this case and has no bearing on this Court's consideration of Certiorari. Moreover, the parameters of coverage under the Surety Bonds is not truly in controversy. In this regard, the Appellate Division stated:

> It is disingenuous for the sureties to suggest that the only way the Union could have protected its members' right was for it to have purchased a fringe benefit bond. This may be necessary under some private employment bonds where the contractor is not statutorily required to obtain a surety bond for payment of all labor performed, but not under the statutory bond here under consideration. When the bond includes the total of the workers' wages, there is no reason to require a separate bond for a portion of the same.

(Footnote omitted). A.30.

IFIC filed a Motion to Dismiss the Complaint, alleging that the Federal Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* preempts the Bond Act, and prevents a surety from being liable for a contractor's delinquent payment of fringe benefit contributions. The Law Division granted IFIC's motion and dismissed the Trustees'

Complaint. On Appeal, the New Jersey Appellate Division, on February 20, 1996, reversed the Law Division and reinstated the Trustees' complaint. Upon Certification, the New Jersey Supreme Court on April 9, 1997, affirmed the judgement of the Appellate Division. After a thorough analysis of precedent, (A.5-16), the New Jersey Supreme Court held that "ERISA does not preempt suits by union trust funds against sureties that have issued bonds to employers for public works projects pursuant to the Bond Act." A-16.

The New Jersey Supreme Court's opinion follows this Court's recent decisions in *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995) and *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, __ U.S. __, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997) (A.8-9, A.15-16) and is further supported by this Court's subsequent decision in *De Buono v. NYSA-ILA Medical and Clinical Services*, __ U.S. __, 117 S. Ct. 1747, 1752 (1997). The New Jersey Supreme Court's decision is consistent with numerous opinions from various United States Courts of Appeals as well as decisions from various state courts of last resort. A.10-13.

IFIC filed the instant Petition for a Writ of Certiorari alleging that the New Jersey Supreme Court misinterpreted *Travelers* and *Dillingham*, and misapplied decisions from the Second and Third Circuit Courts of Appeal and is in conflict with several Circuit Courts of Appeals. We submit that the New Jersey Supreme Court's decision was well-reasoned, properly decided, and presents no conflict warranting review on Certiorari pursuant to Rule 10 of the Rules of the United States Supreme Court.

REASONS FOR DENYING THE WRIT

I.

THE GRANTING OF CERTIORARI IS UNWARRANTED AS THE DECISION OF THE NEW JERSEY SUPREME COURT FOLLOWS DECISIONS OF THE UNITED STATES SUPREME COURT, AND IS CONSISTENT WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS AND DECISIONS OF STATE COURTS OF LAST RESORT.

A. The New Jersey Supreme Court Correctly Followed *Blue Cross & Blue Shield Plans v. Travelers Ins., Co.*; *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*; and is Further Supported by *De Buono v. NYSA-ILA Medical and Clinical Services.*

After a thorough analysis of precedent on the preemption issue (A.5-16), the New Jersey Supreme Court held that ERISA does not preempt suits by union trust funds against sureties that have issued bonds to employers for public works projects pursuant to the Bond Act. The court's ruling followed the United States Supreme Court's recent decisions of *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S. Ct 1671, 131 L. Ed. 2d 695 (1995) and *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, __ U.S. __, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997) (A.8-9, A.15-16). The New Jersey Supreme Court's April 9, 1997 ruling is further supported by this Court's decision in *DeBuono v. NYSA-ILA Medical and Clinical Services*, __ U.S. __, 117 S. Ct. 1747 (1997), rendered on June 2, 1997.

When the United States Supreme Court reversed the Second Circuit in *Travelers*, it warned against taking the "relate to"

clause to "the furthest stretch of its indeterminacy" and held that generally applicable statutory surcharges which increased the costs of certain insurance and health care plans do not constitute a "connection with" employee benefit plans and do not trigger ERISA preemption. 115 S. Ct. at 1677. This Court emphasized a conservative approach to ERISA preemption by:

— warning against an over-expansion of ERISA preemption;

— underscoring that laws of general applicability do not trigger preemption;

— warning against finding preemption in areas of traditional state regulation; and

— finding that the basic thrust of the preemption clause was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans.

115 S. Ct. 1674-1680.

In *Dillingham*, this Court held that ERISA did not preempt a California state statute permitting contractors to pay laborers enrolled in an apprentice program less than the prevailing wage. This Court emphasized that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. 117 S. Ct. at 838. In applying *Dillingham* to the case at bar, the New Jersey Supreme Court noted that both the California statute and the Bond Act were enacted before ERISA, and dealt with matters traditionally subject to local regulation. A.9. The California statute was one of general applicability, applying the same wage guidelines to apprenticeship programs regardless of the presence

or absence of an ERISA plan. Similarly, the Bond Act is one of general applicability. The New Jersey Supreme Court found it to be "ERISA neutral" and "union neutral" as its terms do not require the payment of fringe benefits. Rather, the contractor creates the obligation if he chooses employ union labor. A-15.

In the United States Supreme Court's subsequent visitation to the preemption issue, in *DeBuono,* this Court held that ERISA did not preempt a New York state tax on gross receipts for patient services at health care facilities, emphasizing that when a law "clearly operates in a field that has been traditionally occupied by the States," those seeking preemption "bear the considerable burden of overcoming the starting presumption that Congress does not intend to supplant state law." *DeBuono,* 117 S. Ct. at 1752, *citing Traveler's,* 115 S. Ct. at 1674. This Court further stated that preemption was not warranted when the statute at issue was among "one of 'myriad state laws' of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not 'relate to' them within the meaning of the governing statute." *Id.* at 1752. This Court noted that the law at issue did not include a forbidden method of calculating pension benefits, did not require employers to provide certain benefits, did not contain provisions that expressly refer to ERISA or ERISA plans, and that the existence of a pension plan was not a critical element of the state law cause of action thereunder. *Id.*

In the context of the reasoning and guidelines set by *Travelers, Dillingham* and as affirmed by *De Buono*, the New Jersey Supreme Court made the following findings:

— the Bond Act was in a field traditionally regulated by the States and in fact "existed in various forms for almost eighty years, long before Congress adopted ERISA" A.16

— "The Bond Act is a generally applicable law that functions without any reference to ERISA." A.16; it is both "ERISA neutral" and "union neutral" A.15,

— "It does not frustrate ERISA's goal of uniform plan administration," A.16,

— "[it does not] make reference to ERISA", A.16.

— "[it does not] conflict with ERISA enforcement mechanisms" A.16, and

— "[it does not] touch upon any of the rights or duties incident to ERISA plans." A.16.

The New Jersey Supreme Court further noted that while the Bond Act may cause the cost of doing business in New Jersey to be different from the cost in other states, cost-uniformity was not an object of ERISA preemption. A.16.

Petitioner IFIC, in Point III of its Legal Argument, asserts that the New Jersey Supreme Court "misconstrued" this Court's holdings in *Travelers* and *Dillingham*, and attempts to distinguish these decisions by arguing that the Bond Act directly impacts the "funding and enforcement" of ERISA plans. Pet. 22-23. The New Jersey Supreme Court, however, expressly found otherwise: that the Bond Act **did not** frustrate ERISA's goal of uniform plan administrative (which would include funding) and that the Bond Act **did not** conflict with ERISA enforcement mechanisms. A.16. Petitioner IFIC cites to no decisions of this Court to support its legal conclusion, and we submit IFIC's argument is unfounded.

B. The New Jersey Supreme Court's Decision is Consistent With Decisions of the United States Courts of Appeals.

The New Jersey Supreme Court relied upon several decisions from the United States Courts of Appeals which analyzed the preemption issue in factual situations similar to the instant case. In *Greenblatt v. Delta Plumbing & Heating Corp*, 68 F.3d 561 (2d Cir. 1995), the guardians of a pension trust commenced legal action against a surety bond after the employer-contractor filed for bankruptcy. Finding the facts in *Greenblatt* substantially identical to the instant case, the New Jersey Supreme Court stated:

> The [Greenblatt] court found that New York common law concerning surety liability did not mandate employee benefit structures or provide alternate enforcement mechanisms that would trigger preemption under *Travelers*. New York surety law made no reference to ERISA, did not conflict with any ERISA enforcement mechanism, did not touch on any of the rights or duties incident to the ERISA plan, and did not conflict with any cause of action under ERISA.

A.10, citing *Greenblatt*, 68 F.3d at 574-75. The New Jersey Supreme Court further noted that the Trustees' claim against IFIC was a common state law action:

> The union's cause of action against the surety on the bond is "but a 'run-of-the-mill' state law claim," similar to a tort or contract action.

A.10, citing *Greenblatt*, 68 F.3d at 574.

Recognizing that Greenblatt involved a common law cause of action, the New Jersey Supreme Court also cited to *Bleiler v. Cristwood Constr., Inc.*, 72 F.3d 13 (2d Cir. 1995) and *Local 46, Metallic Lathers Union v. Trataros Constr., Inc.*, 920 F. Supp. 55 (S.D.N.Y. 1996), which cases applied *Greenblatt* and *Travelers* to a claim against a surety bond issued pursuant to a public bond statute similar to the Bond Act. The New Jersey Supreme Court rejected IFIC's attempt to distinguish its liability under a surety bond issued to a contractor on a private project and its liability under a similar bond issued to a contractor on a public works contract pursuant to state statute, stating:

> We find the distinction unconvincing. ERISA does not make such a distinction, and the analysis of the federal courts does not turn on the possible difference between a publicly-required bond and one entered into voluntarily.
>
> The lawsuits are common-law actions on contracts the employer made as a condition for obtaining a public construction contract. They do not represent actions that undermine the set of remedies ERISA provides to beneficiaries under its "comprehensive Civil enforcement scheme."

(Citations omitted) (A-14).

The above Second Circuit decisions are consistent with decisions from the Third Circuit, also noted by the New Jersey Supreme Court. In *Ragan v. Tri-county Excavating, Inc.*, 62 F.3d 501 (3d Cir. 1995), the Third Circuit rejected the surety's preemption argument, thereby permitting the administrator of benefit funds to pursue a state action against a surety under a

surety bond. The Third Circuit characterized causes of action against the surety bond as "generally applicable" laws that make no reference to ERISA plans, were not predicated on the existence of an ERISA plan, and indeed function irrespective of the existence of an ERISA plan. *Ragan*, 62 F.3d at 511; *See United Wire v. Morristown Memorial Hospital*, 995 F.2d 1179, 1192-1193 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 382, *reh. denied*, 114 S. Ct. 651 (1993).

The Third Circuit in *Ragan* also addressed and rejected the "funding" theory advanced by IFIC in the instant case. In this regard, the Third Circuit stated:

> Here, the district court need only determine [the surety's] obligations under the Bond. It need make no inquiry into the validity or status of the funds (or indeed whether they are ERISA funds), nor need it explore [the surety's] motives regarding employee benefits. The fact that the claimant under the bond happens to be an ERISA fund is not the kind of "critical factor in establishing liability" that prompted preemption. . . .
>
> . . . Simply because the sums collected may ultimately feed into an ERISA-governed fund does not in itself mean that the cause sued upon creates rights or restrictions which are "predicated on" the existence of an ERISA plan.

Ragan, 62 F.3d at 511. *See Dillingham*, (California statute permitted contractors to pay laborers enrolled in an apprentice program less than the prevailing wage); *Keystone Chapter, Associated Builders & Contractors, Inc. v. Foley*, 37 F.3d 945

(3d Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1393, 131 L. Ed. 2d 244 (1995) (Pennsylvania's State Commissioner prescribed minimum wages and benefits paid to both union and non-union laborers on public works projects.) (Under IFIC's "funding theory" the statutes of *Dillingham* and *Keystone* certainly would not survive a preemption analysis as they directly affect monies which may go into an ERISA funds; as laws of general applicability, however, the statues did not trigger preemption.)

Petitioner IFIC, in its efforts to find a conflict among the Federal Circuit Courts, cites to decisions from the First, Second, Fifth and Ninth Circuits.[4] Admitting that these cases are distinguishable from the case at bar by the fact that the statutes therein **expressly referred to ERISA plans**, IFIC asserts that preemption was found for the independent reason that such laws provide an alternative cause of action for the collection of ERISA contributions thereby infringing upon ERISA's enforcement mechanisms. From this premise, IFIC concludes that a conflict exists between these cases and the cases relied upon by the New Jersey Supreme Court.[5]

We submit that the alleged conflict is contrived. First, state statutes with **express reference to ERISA plans** have

4. *Williams v. Ashland Engineering Co., Inc.*, 45 F.3d 588 (1st Cir.), *cert. denied*, __ U.S. __, 64 U.S.L.W. 3229 (1996); *Sturgis v. Herman Miller Inc.*, 943 F.2d 1127 (9th Cir. 1991); *Iron Workers Pension Fund v. Terotechnology Corp.*, 891 F.2d 548 (5th Cir. 1990); *McCoy v. Massachusettes Institute of Technology*, 950 F.2d 13 (1st Cir. 1991), *cert. denied*, 504 U.S. 910 (1992); *Romney v. Lin*, 105 F.3d 806 (2d Cir. 1997).

5. IFIC also cites to decisions from lower Federal District and State courts which allegedly support its theory. As these cases are not decisions of a United States Court of Appeals or a state court of last resort, we submit they do not meet the Considerations of Rule 10 of the Rules of the Supreme Court and do not warrant extensive briefing.

universally been recognized as triggering preemption as they have a clear "connection with or reference to" ERISA benefit plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 103 S. Ct. 2890, 2899-2900, 77 L. Ed. 2d 490 (1983); *See De Buono*, 117 S. Ct. at 1751. On this basis alone, the cited cases are clearly distinguishable from the cases relied upon by the New Jersey Supreme Court which dealt with statutes of **general applicability.** Second, consistent with basic conflict preemption analysis, the New Jersey Supreme Court in the instant case, and the cases upon which it relied, expressly found that the Bond Act **did not conflict with ERISA enforcement mechanisms.** A. 16. Lastly, and paramount, IFIC's legal conclusion stands contrary to the starting presumption (emphasized by this Court in *Travelers, Dillingham* and *De Buono*), that Congress does not intend to supplant state law particularly in fields of traditional state regulation.

IFIC cites to the Ninth Circuit decision of *Trustees of the Electrical Workers Health and Welfare Trust v. Marjo Corp.*, 988 F.2d 865 (9th Cir. 1992) and a decision affirmed by the Ninth Circuit in 1993, *Puget Sound Electrical Workers Health and Welfare Trust Fund v. Leaf Corp., Inc.*, 1991 WL537068 (S.D. Wash. 1991), *aff'd*, 5 F.3d 539 (9th Cir. 1993) as creating a conflict among the Federal Circuit Courts which this Court must resolve. To the extent that a conflict of authoritative precedent existed in 1992 and 1993, we submit that this Court has directly resolved same and provided guidance to the Federal Courts of the Ninth Circuit in *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, __ U.S. __, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997) by reversing the decision of the Ninth Circuit below. This Court stated therein:

> . . . Rather, to determine whether a state law has the forbidden connection, we look both to the objectives of the ERISA statute as a guide to the scope of the state law that

> Congress understood would survive as well as to the nature of the effect of the state law on ERISA plans.
>
> As is always the case in our preemption jurisprudence, where federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the assumption that the historic police posers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

(Citations omitted). 117 S. Ct at 838. We submit that the cases relied upon by IFIC must be reexamined in light of this Court's guidance in *Dillingham, Travelers* and *De Buono.*

C. The New Jersey Supreme Court's Decision is Consistent With Decisions of Numerous State Courts.

The New Jersey Supreme Court cited numerous state court decisions from Connecticut, Hawaii, Indiana and Pennsylvania which found no preemption of claims for employee fringe benefits in circumstances similar to those presented in the instant case. A.13.

The Indiana Court of Appeals, in *Seaboard Surety Company v. Indiana State District Council of Laborers, et al.*, 645 N.E. 2d 1121 (Ind. Ct. App. 1995), held that an action to collect on a bond written pursuant to the Indiana Public Works Statute was not pre-empted by ERISA and that recovery on such bonds affected employee benefit plans in "too tenuous, remote, and peripheral a manner" to warrant a finding that they "relate to" such a plan. *Id.* at 1127. The matter before the court was substantially identical to the instant case; the plaintiff/Benefit

Funds sought to recover delinquent fringe benefit contributions under surety bonds issued by defendant/Surety. The bonds were issued pursuant to an Indiana statute similar to the Bond Act, both which require the issuance of payment and performance bonds on public works projects. Neither the Indiana statute nor the Bond Act referred to ERISA benefit plans, nor singled them out for special treatment. *Id.* at 1127. In permitting the Benefit Funds to maintain their state law action, the Court noted that the statutory bond requirement and recovery against those bonds were "traditional exercises of state authority." *Id.*

The surety in *Seaboard*, like IFIC, asserted that the bond statute must be preempted as it impermissibly impacted on ERISA's enforcement scheme. After extensive analysis of ERISA's enforcement scheme, the Indiana Court of Appeals rejected the argument stating,

> We conclude that the enforcement scheme and extensive remedies of ERISA discussed by the Court in *Pilot Life* [*Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987)] and *Russell* [*Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985)] refer only to a beneficiary's remedies against the plan and that a state law will not automatically be pre-empted because it provides a supplemental remedy to collect delinquent contributions . . .

Id. at 1124.

The United States Supreme Court recently denied review of Hawaii's State Supreme Court ruling that use of the state's lien law to assist in collecting judgment for delinquent ERISA trust fund contributions was neither expressly nor impliedly preempted by ERISA. *Hawai'i Laborers' Trust Funds v. Maui*

Prince Hotel, 81 Hawai'i 487, 918 P.2d 1143 (1996), *cert. denied*, __ U.S. __, No. 96-1651, 6/30/97. The Hawaii Supreme Court noted the same concerns that this United States Supreme Court has emphasized in *Travelers, Dillingham* and *De Buono*: (1) the Hawaii statute was "general" in nature and did not single out ERISA plans; (2) the statute did not conflict with ERISA's enforcement scheme; and (3) the statute dealt with issues traditionally within the state police powers. *Id.* at 1155-1157. After an analysis of legislative history, the court further noted:

> . . . it is apparent that Congress, having declared that effective collection of employer contributions by multiemployer plans to be an important policy concern of ERISA, did not intend to deny employee benefit plans access to state enforcement tools to collect delinquent contributions.

(Citations omitted). *Id.* at 1166. *See also Eacott v. Insurance Co. of North America*, 40 Conn. App. 777, 673 A.2d 587 (1996) (Following *Travelers, Greenblatt* and *Bleiler,* the court held that ERISA did not preempt Trustees' claims to recover contributions pursuant to labor and material payment bond); *Carpenters Local 261 Health & Welfare Fund v. National Union Fire Ins.*, 686 A.2d 1373 (Pa. Commw. Ct. 1996) (Pennsylvania's Public Works Contractors' Bond Law was not preempted by ERISA, therefore surety was obligated under surety bonds to make benefit contributions). A.13.

While the New Jersey Supreme Court recognized decisions from state courts which found ERISA preemption under various circumstances, the court found these cases distinguishable, generally because the laws at issue specifically named ERISA plans, or the laws at issue created additional causes of action

against parties that have no contractual obligation to ERISA plans. A.13-14.[6, 7]

II.

BECAUSE A SURETY'S LIABILITY IS GOVERNED PURELY BY STATE LAW, IFIC'S "QUESTION PRESENTED" INACCURATELY CONCLUDES THAT A SURETY CANNOT BE LIABLE FOR UNPAID CONTRIBUTIONS.

Respondent objects to IFIC's phrasing of the "Question Presented" as it inaccurately concludes that "the Employee Retirement Income Security Act of 1974 ("ERISA") provides that only an employer can be liable for unpaid contributions to union pension and benefit funds . . ."

We agree with IFIC's basic premise that federal claims created by ERISA (29 U.S.C. § 1132) are limited to "employers" pursuant to 29 U.S.C. § 1145[8], and that the weight of precedence

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6. *Puget Sound Elec. Workers Health & Welfare Trust Fund v. Merit Co.*, 123 Wash. 2d 565, 870 P.2d 960 (1994); *Carpenters Southern Cal. Administrative Corp. v. El Capitan Dev. Co.*, 53 Cal. 3d 1041, 282 Cal. Rptr. 277, 811 P.2d 296, *cert. denied*, 502 U.S. 963, 112 S. Ct. 430, 116 L. Ed. 2d 450 (1991); *Prestridge v. Shinault*, 552 So. 2d 643 (La. Ct. App. 1989), *writ denied*, 559 So. 2d 131 (La. 1990).

7. IFIC also cites to decisions from lower state courts which allegedly create a conflict with the New Jersey Supreme Court's decision. As these cases are not decisions from state courts of last resort, we submit they do not meet the considerations of Rule 10 of the Rules of the Supreme Court and do not warrant extensive briefing.

8. An employer under ERISA is defined as:

> any person acting directly as an employer, or indirectly (Cont'd)

has rejected efforts to bring sureties within the purview of ERISA. IFIC's self-serving legal conclusion that it therefore escapes all state governed liability is without legal basis.

The role of sureties in the context of ERISA has been examined by numerous courts which held that sureties cannot be considered "employers" as defined in ERISA § 1002(5) because there is no ownership or agency relationship between surety and employer, but only a contractual relationship by which the surety guarantees payment of a certain sum if the contractor defaults on its obligations. *Greenblatt v Delta Plumbing & Heating Corp.*, 68 F.3d 561, 575-576 (2d Cir. 1995); *Bleiler v. Cristwood Contr. Inc.*, 72 F.3d 13, 14 (2d Cir. 1995); *Ragan v. Tri-county Excavating, Inc.*, 62 F.3d 501, 512 (3d Cir. 1995); *Giardiello v. Balboa Insurance Co.*, 837 F.2d 1566, 1569 (11th Cir. 1988); *Xaros v. U.S.F.& G.*, 820 F.2d 1176, 1179 (11th Cir. 1987). From this legal premise, the courts have held that a surety's "obligations are fixed by contract and regulated by state law for the protection of the public." *Xaros*, 820 F.2d at 1179; *Ragan*, 62 F.3d at 512; *Giardiello*, 837 F.2d at 1569.

In its presentation of its "Question Presented," IFIC advocates self-immunity from state law and from the express language of its own surety bonds. In rejecting IFIC's argument, the New Jersey Supreme Court noted the "illogic" of finding that Congress intended to preempt a state law without providing any correlative federal standards. A.7. We submit that IFIC's argument is unfounded and adopt the position of the United

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(Cont'd)

> in the interests of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

29 U.S.C. § 1002(5).

States District Court for the District of Vermont under similar circumstances:

> The Court can find no case which takes the position that [the surety] would have this Court adopt: state law actions to recover ERISA benefits from sureties are pre-empted by ERISA, yet ERISA actions themselves provide no chance of recovery because sureties are not "employers."
>
> In essence, [the surety] would like the Court to engage in a "heads, I win — tails, you lose" analysis; pre-empting any state law cause of action and yet denying any possible recovery under ERISA as well. This the Court will not do.

Local 538, United Brotherhood of Carpenters and Joiners of America v. United States Fidelity and Guaranty Company, Docket No. 2:93-CV-59, at p.18, n.10 (D. Vt. 1994).

CONCLUSION

For the reasons set forth above, respondent Board of Trustees of Operating Engineers Local 825 Fund Service Facilities respectfully submits that the Petition of International Fidelity Insurance Company for a Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

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In The

Supreme Court of the United States

October Term, 1996

INTERNATIONAL FIDELITY INSURANCE COMPANY, a New Jersey Corportion,

Petitioner,

vs.

BOARD OF TRUSTEES OF OPERATING ENGINEERS LOCAL 825 FUND SERVICE FACILITIES,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of New Jersey

BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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28 pp

QUESTION PRESENTED

Does the Employee Retirement Income Security Act of 1974 ("ERISA") preempt provisions of the New Jersey Public Works Bond Act, N.J.S.A. 2A:44-143 *et seq.*, a generally applicable State law that functions without any reference to ERISA, which law requires contractors to post bonds for labor performed on and material supplied to public works projects, so as to preclude an ERISA fund from suing the surety on the bond.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

Amici curiae hereby rely upon and incorporate by reference the List of Parties to the Proceedings Below set forth in the Petition for Writ of Certiorari by petitioner International Fidelity Insurance Company.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are various New Jersey non-profit multiemployer fringe benefit trust funds, established and governed under the provisions of the Employee Retirement Income Security Act ("ERISA") 29 U.S.C. § 1002(c)(1). The funds provide benefits to covered employees of various labor organizations, and were established pursuant to separate trust indentures as required by law, 29 U.S.C. § 1001 *et seq.* Pursuant to the provisions of collective bargaining agreements between various unions and employers, each employer is required to pay contributions to each of the funds administered by the trustees of those funds as part of the compensation package paid to the employees represented by the various unions. These contributions enable the funds to provide pension, medical, hospital, annuity, unemployment and other benefits to covered employees.

The various funds provide such benefits to over 30,000 employees and approximately 70,000 additional dependents in the State of New Jersey. The funds provide these benefits to employees primarily in the construction and related industries.

For reasons not germane to the instant petition, there is a continuing problem of delinquent contractors in the construction industry. Numerous employers consistently fail or refuse to pay

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1. This brief is submitted on behalf of the New Jersey State Carpenter Benefit Funds, Carpenters Local No. 6 Benefit Funds, Laborers Local Union Nos. 472 & 172 Welfare and Pension Funds, Teamsters Local No. 408 Welfare and Pension Funds, and Laborers Local Union Nos. 72, 156, 569 & 711 Welfare and Pension Funds.

This brief was not authored in whole or in part by counsel for a party. No person or entity, other than *amici curiae*, its members, or counsel have made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37 of the Rules of Court, petitioner and respondent have consented to the filing of this brief on behalf of *amici curiae*. Their letters of consent have been filed with the Clerk of the Court.

contributions due these funds. The failure to pay jeopardizes the medical, hospitalization, pension and other benefits due to the members, the beneficiaries of the trust, and undermines the financial integrity of the funds.

As with any type of properly operated pension and welfare fund, the various funds can remain financially sound only if they collect the contributions that were determined to be necessary to provide the benefits, and if they invest those contributions wisely. If the contributions are not made as promised by the contracting employers, then the funds have the highest fiduciary obligation to pursue payment from any and all legitimate sources so as to ensure that there are monies available when covered employees retire or take ill.

Petitioner seeks to bar the trustees of benefit funds in New Jersey from utilizing New Jersey's generally applicable bonding statute in order to pursue and collect monies owing as a result of work performed by covered employees on public projects. Such a result would preclude the trustees from discharging their obligations and needlessly deprive the participants and their beneficiaries of monies they worked for and that are rightfully theirs. *Amici curiae* thus have a keen interest in the petition *sub judice*.

OPINIONS BELOW

Petitioner seeks review of the decision of the Supreme Court of New Jersey reported at *Board of Trustees of Operating Engineers Local 825 Fund Service Facilities v. International Fidelity Insurance Co.*, 148 N.J. 561, 691 A.2d 339 (1997), which is reprinted in petitioner's appendix at pp. A-1 through A-18. The decision of the Appellate Division of the Superior Court of New Jersey in this matter is reported at 287 N.J. Super. 498, 671 A.2d 596 (App. Div. 1996), and is reprinted in petitioner's appendix at pp. A-19 through A-31.

STATEMENT OF JURISDICTION

Petitioner contends that this Court should grant *certiorari* pursuant to 28 U.S.C. § 1257(a) because the decision of the Supreme Court of New Jersey rendered on April 9, 1997 involves a question of whether a State statute is repugnant to the laws of the United States.

RELEVANT STATUTORY PROVISIONS INVOLVED

The statute relevant to this matter, N.J.S.A. 2A:44-143 *et seq.*, entitled the "New Jersey Public Works Bond Act" ("Bond Act"), is reprinted in petitioner's appendix at pp. A-32 through A-45.

STATEMENT OF THE CASE

Amici curiae hereby rely upon and incorporate by reference the Statement of the Case set forth in the Brief in Opposition to the Petition for Writ of Certiorari submitted by respondent Board of Trustees of Operating Engineers Local 825 Fund Service Facilities.

LEGAL ARGUMENT

THIS HONORABLE COURT SHOULD DENY *CERTIORARI* BECAUSE PETITIONER FAILS TO OFFER ANY COMPELLING REASONS FOR REVIEW OF THE DECISION OF THE SUPREME COURT OF NEW JERSEY; THE PREEMPTION ISSUE RAISED IN THIS PETITION HAS BEEN DETERMINED AND RESOLVED BY THIS COURT AND HAS BEEN UNIFORMLY FOLLOWED BY THE LOWER FEDERAL COURTS AND STATE COURTS.

Review on a writ of *certiorari* is not a matter of right, but of judicial discretion. Sup. Ct. R. 10. A petition for a writ of *certiorari* will be granted only for compelling reasons. *Id.*

Petitioner urges this Court to grant *certiorari* because there purportedly exists conflicting authority on the issue presented for review; namely, whether ERISA preempts a union benefit fund's action against a surety under a state law of general applicability which does not refer to an ERISA plan. In particular, petitioner posits that there is a "split of authority" among the courts that have addressed the issue and, hence, there exists a compelling need to have this Court render a conclusive pronouncement.

Petitioner further contends that this Court should grant *certiorari* pursuant to 28 U.S.C. § 1257(a) because the decision rendered by the Supreme Court of New Jersey is repugnant to the laws of the United States. In particular, petitioner argues that the Supreme Court of New Jersey wrongly held that the Bond Act is not preempted by ERISA because its decision was based upon:

> (i) a misinterpretation of two recent decisions from this Court (*New York Conference Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), and *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. __, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997);
>
> (ii) the misapplication of two decisions that are readily distinguishable from the facts at issue here (*Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561 (2nd Cir. 1995), and *Ragan v. Tri-County Excavating, Inc.*, 62 F.3d 501 (3d Cir. 1995));
>
> (iii) a decision to follow the reasoning of several wrongly-decided cases that upheld state statutes against an ERISA preemption challenge.

(Petition for Writ of Certiorari, at pp. 4-5).

For the reasons which follow, *certiorari* should be denied because there is no compelling reason for this Court to review the decision of the Supreme Court of New Jersey.

First, the decision of the Supreme Court of New Jersey represents a proper application of preemption analysis to the federal and state laws involved. The decision below correctly considered and construed the scope of the preemption provision in ERISA, the Congressional objectives in enacting ERISA, the language, purpose and history of the state law involved, and the judicial presumption against overly broad assertion of federal supremacy over longstanding state laws in traditional areas of state regulation. The analysis employed, and the result reached, by the Supreme Court of New Jersey, are entirely consistent with this Court's ERISA preemption rulings. Also, the New Jersey Supreme Court's interpretation of *Greenblatt* and *Ragan* is identical to the interpretation of those cases by the federal and state courts in those respective circuits.

Second, the alleged split among courts regarding this issue is more imagined than real. The petitioner fails, or simply refuses, to recognize that bond laws which refer to ERISA plans are different than those — such as the one involved here — which do not. To the extent court decisions find preempted a bond law which does *not* refer to an ERISA fund, those cases — of which there are only two — predate this Court's decision in *New York Conference Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 117 S. Ct. 832, 131 L. Ed. 2d 695 (1995). Any residue of confusion or conflict was resolved by this Court's decision in *Travelers*, a case relied upon by the Supreme Court of New Jersey. *Travelers* clarified this Court's prior ERISA preemption jurisprudence, and rendered a conclusive heuristic determination of the issue presented. The two cases cited by petitioner in support of its assertion that there is a split of authority on the preemption issue were decided before *Travelers* and cannot now be employed for the purpose of demonstrating a divergence of authority. There is no compelling reason for this Court to heed petitioner's call for yet another ERISA pronouncement; it already did so in *Travelers*.

In determining whether ERISA preempts a particular state law, this Court has delineated a two-part analysis, infused by the judicial presumption that Congress did not intend to supplant state laws. *Travelers*, 115 S. Ct. at 1676; *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 2128, 68 L. Ed. 2d 576 (1981). The ERISA preemption analysis first requires a court to examine the text of the provision in question, 29 U.S.C. § 1144(a) ("Section 514(a)"), and if that is insufficient to resolve the matter, to look to the purpose of the Act in which the provision occurs. *Travelers*, 115 S. Ct. at 1677.

ERISA's preemption clause states, in pertinent part, that "ERISA preempts any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (§ 514(a)). A state law "relates to" an ERISA plan for purposes of § 514(a) if it either (a) "refers to" or (b) has a "connection with" such a plan. *California Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. __, 117 S. Ct. 832, 837, 136 L. Ed. 2d. 791 (1997).

A state law or lawsuit "refers to" an ERISA plan not only if it expressly imposes requirements upon ERISA plans, but also if it is premised upon the existence of an ERISA plan, or if it acts immediately and exclusively upon such plans, or if the ERISA plan is essential to the law's operations. *Id.* 117 S. Ct. at 837-38. Thus, a state law refers to an ERISA plan if the state law is specifically designed to affect an ERISA plan, if it singles the plan out for special treatment, or if the rights or duties it creates are unique to such plans. *Mackey v. Lanier Collection Agency and Service, Inc.*, 486 U.S. 825, 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1988); *United Wire, Metal & Machine Health and Welfare Fund v. Morristown Memorial Hospital*, 995 F.2d 1179, 1192 (3d Cir.), *cert. denied*, 510 U.S. 1031, 114 S. Ct. 651, 126 L. Ed. 2d 332 (1993); *Bricklayers Local 33 v. America's Marble Source*, 950 F.2d 114 (3d Cir. 1991).

A state law also "relates to" an ERISA plan for purposes of § 514(a) if it has a "connection with" such a plan. *Travelers*, 115 S.

Ct. at 1677. However, unlike laws or suits which refer to an ERISA plan as explained above, laws which have only a connection with an ERISA plan are more amorphously defined. Where the state law does not refer to a fund, plumbing the depths of "connection with" requires a critical analysis of the purpose of ERISA and the mediacy of that purpose with the state law. *Travelers*, 115 S. Ct. at 1677. An unchecked concept of "connection with" which is universal in nature is as unhelpful a measure of preemption as a notion of nearly infinite relations is to "relates to." *Id.* When the state law does not "refer to" a trust fund, courts must go beyond the unhelpful language of § 514(a) and look instead at the objectives of ERISA as a guide to what state laws Congress sought to supplant or to let stand.

ERISA is a comprehensive statute designed and intended to promote and preserve the interests of employees and their beneficiaries in employee welfare and pension funds. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1985). As this Court has repeatedly recognized and explained:

> In enacting ERISA, Congress' primary concern was with the management of funds accumulated to finance employee benefits and the failure to pay employee benefits from accumulated funds. To that end, it established extensive reporting, disclosure, and fiduciary requirements to ensure against the possibility that the employee's expectations of the benefit would be defeated through poor management by the plan administrator.

Massachusetts v. Morash, 490 U.S. 107, 115, 109 S. Ct. 1660, 1673, 104 L. Ed. 2d 98 (1989). In this Court's most recent exercise in ERISA preemption, this same concern was again used as the guide in assessing, and denying, federal preemption. *Dillingham*, 117 S. Ct. at 832, 838-39.

Congress also intended ERISA to protect the plans themselves from being subjected to rules and regulations which would vary

from state to state, thereby burdening the plans with conflicting requirements which would hinder and render more expensive the operation of the plan. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9, 15 (1987); *United Wire, supra*; *Consumer Ben. Ass'n of U.S. v. Lexington Ins. Co.*, 731 F. Supp. 1510, 1515 (M.D. Ala. 1990). What triggers ERISA's preemption is not just *any* effect on a plan's administrative procedure, but a *particular* effect on the primary administrative function of the plan, such as mandating benefits, or determining eligibility for, or the amount of, a benefit. *Shaw*, 463 U.S. at 97; 103 S. Ct. at 2900; *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 146-147 (2d Cir.), *cert. denied*, 493 U.S. 811 (1989). Thus, state law has a connection with an ERISA plan if the law dictates the choices faced and made by the plan. *Dillingham*, 117 S. Ct. at 841; *Ferguson Electric Co., Inc. v. Foley*, 115 F.3d 237, 240 (3d Cir. 1997).

And, as noted above, the analysis of the scope of a federal law's preemptive power will be guided by the historic precept that the Court will never assume lightly that Congress has derogated state regulation, but instead the Court will start its analysis with the presumption that Congress did *not* intend to supplant state law. *Dillingham*, 117 S. Ct. at 838; *Travelers*, 115 S. Ct. at 2378.

It is within the context of the objective of ERISA to protect the plan participants' expected benefits by means of regulation of funding, fiduciary duty, and disclosure, combined with the Congressional intent of establishing a uniform body of benefits laws, that this Court has mapped out the course of federal pre-emption of state laws.

There can be no sensible contention that the New Jersey Bond Act "refers to" an ERISA plan. The Bond Act, N.J.S.A. 2A:44-143, was enacted in 1918 as a general statute permitting any supplier to a contractor of a public job to sue the surety on the bond. The Act does not contain a reference to any ERISA plan, and confers no special benefit to or unique status upon such plans. Indeed, petitioner makes no claim that it does. If preemption exists, it is not on the basis that the Bond Act refers to an ERISA plan.

Since the Bond Act does not refer to an ERISA plan, under any possible conception, the analysis must be whether the Act is connected with an ERISA plan.

Clearly the Bond Act imposes no financial or administrative burdens upon an ERISA plan. On the contrary, petitioner claims preemption precisely because the Bond Act supposedly *supplements* a fund's power to pursue monies owing to it. Nor does the Bond act mandate any benefits, eligibility requirements, or coverage. The Bond Act does not dictate any decisions or actions by the fund. The Bond Act does not affect a fund's administrative procedures, nor burden it with obligations or duties. It merely permits a fund to pursue a cause of action against a surety on a bond. Thus far, the Bond Act has not touched any of the indicia of a "connection with" an ERISA fund.

The courts have employed a further analysis to determine whether a state law or claim has a connection with an ERISA plan. That inquiry has focused on whether the law, or cause of action, requires the existence of an ERISA plan for its being. For example, in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990), the Court found preempted a state-recognized wrongful discharge suit which would allow recovery when the plaintiff proves that the principal reason for his discharge was the employer's desire to avoid contributing to or paying benefits under its pension plan. *Id.* 498 U.S. at 140, 111 S. Ct. at 483. Explaining why the suit was preempted, this Court noted that in order to prevail, the plaintiff must plead, and the court must find, that an ERISA plan exists and that the employer intended to avoid its obligations under the plan. That is, "[b]ecause the court's inquiry must be directed to the plan, this judicially created cause of action 'relates to' an ERISA plan." *Id.* 498 U.S. at 140, 111 S. Ct. at 483. There was no cause of action if there were no ERISA plan.

If the state law does not refer to an ERISA plan, and does not require an ERISA plan as a *sine qua non* for its being, the law is not preempted. For example, in *Dillingham*, the California law

required a public works contractor to pay its workers the local prevailing wage, but permitted a lower wage for participants in a state-approved apprenticeship program. The class of eligible apprenticeship programs was not confined to those covered by ERISA. The Court expressly remarked that the California rule functioned irrespective of the existence of an ERISA plan. *Dillingham*, 117 S. Ct. at 839. Moreover, the Court emphasized that the rate of wages to be paid on public jobs was quite remote from the "reporting, disclosure, fiduciary responsibility" issues with which ERISA is expressly concerned, and that wages on public jobs — as well as regulations of apprenticeship programs — were areas historically regulated by the states. *Id.* at 840. In language and meaning directly applicable to the instant case, the Court observed that California has required prevailing wages on public work projects for more than 40 years prior to the enactment of ERISA, which further corroborates its existence independent of ERISA. *Id.* Likewise, and as will be elaborated upon below, the New Jersey Bond Act at issue here was enacted in 1918, more than 50 years before ERISA.

This Court's preemption primer relating to state collection laws was in *Mackey*. In that case, the Court ruled that of Georgia's two anti-garnishment statutes, the one which expressly referred to and specifically prohibited the garnishment of ERISA plan benefits was preempted by ERISA because it applied *only* to ERISA plans, while the other Georgia garnishment law, which was of general application and did not refer to a fund, was *not* preempted. The former law was preempted because of its reference to a trust fund, making the analysis manifestly evident. But, as to the latter more general law, which simply provided for garnishment as a method of collection and did not refer to or mention ERISA plans, the Court found that it did not "relate to" ERISA benefit plans and therefore escaped ERISA's preemptive reach.

The Court noted that ERISA does not provide for a post-judgment collection mechanism, and that Fed. R. Civ. P. 69(a) defers to generalized state law to provide collection methods. *Mackey*,

486 U.S. at 833. Accordingly, the Court concluded that while any state law which "singles out" ERISA plans, whether by "express reference" or for "special treatment", would be preempted, a general state-law method for collecting judgments must remain undisturbed by ERISA. *Mackey*, 486 U.S. at 838 n. 12.

In short, a state law will be preempted if it expressly refers to an ERISA plan, if it was enacted to apply to ERISA plans, if it singles out such plans for special treatment, if it mandates or prohibits decisions by an ERISA plan, or if it acquired its existence by virtue of — or necessitates interpretation of — an ERISA plan. The state law at issue here does none of these. It is a law of general applicability which long antedates ERISA, does not refer to ERISA, does not impose duties on or bind ERISA plans, does not uniquely treat or benefit such plans, and does not require an ERISA plan for its existence.

The New Jersey Bond Act was enacted in 1918 as a law of general applicability for the benefit of all suppliers of equipment, machinery, material, fuels, and labor to public jobs. Specifically, and in pertinent part, N.J.S.A. 2A:44-143 provides:

> When public buildings or other public works or improvements are about to be constructed, erected, altered or repaired under contract, at the expense of the State or any county, municipality or school district thereof, the board, officer, or agent contracting on behalf of the State, county, municipality or school district, shall require the usual bond, as provided for by law, with good and sufficient sureties, with an additional obligation for the payment by the contractor, and by all subcontractors, for all labor performed or materials, provisions, provender or other supplies, teams, fuels, oils, implements or machinery used or consumed in, upon, for

> or about the construction, erection, alteration or repair of such buildings, works or improvements.

This provision is noteworthy both for what it does and does not contain. Enacted decades before ERISA was even a glimmer in Congress' eyes, the Bond Act delineates a risk-spreading form of insurance for *all* suppliers to a public job site. It is not limited to unions, or even labor, or even wages. It applies to providers of any machine, material, fuel or labor. It contains a means of protecting all who supply a public job.[2]

What the Bond Act does *not* contain, directly or indirectly, is any reference to a trust fund. The words or concept of fringe benefit fund, ERISA fund, employee trust fund or the like do not appear in the statute. The New Jersey Public Bond Act falls into that camp of state bond laws of general application which have no reference to a benefit fund, as opposed to those which expressly refer to such funds.

Since the reevaluation of ERISA preemption undertaken in *Travelers*, cases involving state laws requiring a surety bond have uniformly held that the state laws are not preempted. For instance, in *Trustees For Michigan Laborers' Health Care Fund v. Warranty Builders, Inc.*, 921 F. Supp. 471 (E.D. Mich. 1996), the funds sued

2. The petitioner asserts that to include the duty to pay fringe benefits in a surety bond would be unfair to the surety, which supposedly did not consider the risk of such liability. But the benefits owing to laborers on a public job are automatically included as a factor since such benefits are deemed a part of the prevailing wage. *See United States, ex rel. Sherman v. Carter*, 353 U.S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776 (1957) (holding Miller Act provision insuring employer payment of "sums justly due" for labor performed, not limited to wages). Sureties in New Jersey were aware of the practice of including fringe benefits within definition of wages. *See Newark Laborers' Pension-Welfare Funds v. Commercial Union Ins. Co.*, 126 N.J. Super. 1, 312 A.2d 649 (App. Div. 1973) (noting surety had paid benefit contributions owed, and holding that costs and attorneys' fees were recoverable against surety in action to collect an employer's delinquent contributions).

the surety for contributions due by the contractor on a public works job. A Michigan law required the contractor on a public job to obtain a surety bond. The statute, similar in all respects to that in New Jersey, was one of general applicability. *Id.* at 477. The court found that the law was not preempted. As the court explained, the action to collect on the bond constitutes enforcement of the bond only, and does not interfere with, single out, or uniquely apply to the funds. *Id.* at 477, 479. The law does not require any administrative action by the funds, does not cause additional expenses, and applies to the funds in the same manner as it applies to all suppliers on the job. *Id.* at 479. To the extent the law provides an avenue of collection beyond that contained in ERISA's enforcement section, that is only an incidental result of the state law. *Id.* "This law does not effect an ERISA plan in any meaningful way." *Id.*

In *Ragan v. Tri-County Excavating, Inc.*, 62 F.3d 501 (3d Cir. 1995), decided four months after *Travelers*, the Third Circuit found that a state cause of action on a bond is not preempted by ERISA. Noting that the bond was one of general applicability which makes no reference to an ERISA plan, and functions independent of an ERISA fund, the Third Circuit reasoned that the fund's suit against the surety was not predicated on the existence of an ERISA plan. In *Ragan* (unlike in *Ingersoll-Rand*), the cause of action was founded upon the bond, thus there was no need to inquire into — or even to determine — the fund's status as an ERISA plan or not, and the fund's status as an ERISA plan was not critical to establishing liability. *Ingersoll-Rand*, 498 U.S. at 139-40, 111 S. Ct. at 482-84; *Ragan*, 62 F.3d at 511. That the sums collected in the enforcement action on the bond may go to an ERISA plan's assets does not mean the suit is predicated upon ERISA, for if that were the test, the preemption analysis would be simple, and the numerous court analyses engaged in to date meaningless. *Ragan*, 62 F.3d at 512. *See also Local No. 46 Metallic Lathers Union v. Tratoros Construction, Inc.*, 920 F. Supp. 55 (S.D.N.Y. 1996) (suit by ERISA fund against surety on bond required by state law is not preempted under dictates of *Travelers* and *Greenblatt*); *Carpenters*

Local 261 Health and Welfare Fund v. National Union Fire Insurance of Pittsburgh, Pa., 686 A.2d 1373 (Com. Ct. Pa. 1996) (ERISA fund's action against surety under state Public Works Contractors Bond Act is not preempted); *Seaboard Surety Co. v. Indiana State District Council of Laborers and HOD Carriers Health and Welfare Fund*, 645 N.E. 2d 1121 (Ind. Ct. App. 1995) (Indiana Public Works Act, which requires surety bond, not preempted); *Hawaii Laborers Trust Funds v. Maui Prince Hotel*, 81 Hawaii 487, 918 P.2d 1143 (Hw. 1996); *Eacott v. Insurance Company of North America*, 40 Conn. App. 777, 673 A.2d 587 (1996). There is no known post-*Travelers* case which holds a state bond act of general application to be preempted.

Nonetheless, the petitioner argues that insofar as the New Jersey Bond Act creates an avenue of collection supplemental to those prescribed in ERISA, it is preempted. This argument is contrary to court decisions, flies in the face of common sense, and, perhaps most important, is contradicted by ERISA's purpose and legislative history.

First of all, ERISA's civil enforcement remedies (29 U.S.C. § 1132 and 1145) provide a cause of action by the ERISA funds against an "employer." ERISA defines an "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan." 29 U.S.C. § 1002(5). A surety is simply not an employer. As the Third Circuit stated, "[c]ourts that have considered the matter have all but unanimously held that sureties do not fall within this definition." *Ragan*, 62 F.3d at 512.[3] As the Third Circuit explained, the surety does not stand in an employment relationship with the funds or participants, is not the agent of the employer, and is not acting in

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3. At the time *Ragan* was decided, the only court to rule that a surety was an employer was the Southern District in New York. *Greenblatt v. Delta Plumbing & Heating Corp.*, 818 F. Supp. 623, 629 (S.D.N.Y. 1993). However, on appeal the Second Circuit reversed and, *inter alia*, expressly stated that the definition of "employer" under ERISA "does not include a surety . . ." *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561, 575 (2d. Cir. 1995).

the interest of the employer. *Id.* at 512-13. The Third Circuit stressed that the surety does not have an ownership, agency or employment relationship with the fund or employer, and that the only relationship which does exist is a contractual one based on the bond — not on the collective bargaining agreement. *Id.*

Second, Congress did not intend for ERISA to supersede any and all state laws. This Court has repeatedly stressed that there is no ERISA preemption "if the state law has only a 'tenuous, remote, or peripheral' connection with covered plans 'as is the case with many laws of general applicability.' " *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 130 n.1, 113 S. Ct. 580, 583 n.1, 121 L. Ed. 2d 513 (1992). As explained above, the purpose of ERISA's preemption provision is to afford the funds the advantages of a uniform set of administrative procedures in order to avoid the burden which would be imposed by a patchwork quilt of regulations. *Fort Halifax Packing*, 482 U.S. at 11-12, 107 S. Ct. at 2217. It does not follow from this purpose that fund trustees would be preempted from using a state law available to general creditors to collect money judgments. In fact, ERISA trustees are endowed with broad powers and duties to collect fringe benefit contributions in a diligent, systematic, and reasonable manner. *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 573-74, 105 S. Ct. 2833, 2841-42, 86 L. Ed. 2d 447 (1985).

When Congress enacted 29 U.S.C. § 1145, one of the two arms of ERISA's civil enforcement scheme, the intent was to promote prompt payment of contributions and to assist ERISA plans in recovering the costs incurred in connection with delinquencies. *See* Staff of Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess. S. 1076, The Multi-employer Pension Plan Amendments of 1980: Summary and Analysis of Consideration (Comm. P. 1980 at 43-44). One of the problems which the Congress clearly sought to address in enacting 29 U.S.C. § 1145 was the problem created by employer delinquencies. *Id.* Far from ever intending to prevent trust funds from using neutral state statutes that did not relate to employee benefit plans, the Congressional record makes it clear that Congress did not intend to preclude use of permitted state or federal remedies against delinquent employers.

As the House Report states: "The Committee amendment does not change any other type of remedy permitted under State or Federal Law with respect to delinquent multiemployer plan contributions." H.R. Rep. No. 869, 96th Cong., 2d Sess., 1980 U.S.C.C.A.N. 2993, 3038.

To preempt the use of a state bond law of general applicability as a means of collecting monies owing to an ERISA fund would be cruelly ironic, given ERISA's fundamental goal of protecting participants' benefits and assets. Trustees of employee benefit plans have a fiduciary duty to collect delinquent trust fund contributions, and ERISA requires the trustees to discharge their duties solely in the interests of the participants and beneficiaries. 29 U.S.C. § 1104(a)(1). If the trustees of funds in New Jersey may not seek the aid of New Jersey's generalized bonding statute in order to pursue monies properly owing to the funds, the trustees would be needlessly limited in discharging their obligations. More important, this would undermine the salutary policy underlying the federal law and deprive the participants and their beneficiaries of monies that are properly theirs.

Third, the courts have made clear that a state law which merely provides another means of collecting monies rightly belonging to the fund does not preempt ERISA when the state law does not interfere with ERISA's own enforcement scheme (*i.e.*, preemption is triggered by a conflict or restriction, not a supplement.) *Ragan*, 62 F.3d at 512 (state claim preempted if it "conflicts" with ERISA); *Warranty Builders, Inc.*, 821 F. Supp. at 479; *Hawaii Laborers' Trust Fund*, 918 P.2 at 1154; *Plumbers Local 458 Holiday Vacation Fund v. Howard Immel, Inc.*, 151 Wis. 2d 233, 445 N.W. 2d 43, 45 (App. Div. 1989).[4]

The petitioner asserts that at least some courts have found that

4. In *Greenblatt*, the Second Circuit observed that the use of the state bond law to sue a surety for monies owed to the ERISA fund was not a supplemental remedy to ERISA's enforcement provision because a suit against the surety was not even an ERISA matter, the surety not being an employer. 68 F.3d at 576.

a state bond act of application is nonetheless preempted. To be sure, two cases do hold that: *Trustees of Electrical Workers Health and Welfare Fund v. Marjo*, 988 F.2d 865 (9th Cir. 1993) and *Puget Sound Electrical Workers Health and Welfare Trust Fund v. Merit Company*, 870 P.2d 960 (Wash. 1994). However, prior to *Marjo*, the Ninth Circuit had twice found no preemption under identical circumstances.[5] The Ninth Circuit changed its mind in *Marjo* because it construed this Court's then recent holdings as establishing a broader parameter of ERISA preemption. 988 F.2d at 867-68. Whether the Ninth Circuit misread those cases or not, its holding in *Marjo* is certainly wrong under *Travelers* and *Dillingham*. The Ninth Circuit had it right the first two times. And in *Puget*, the Supreme Court of Washington was simply following the Ninth Circuit in *Marjo*. Most important, both *Marjo* and *Puget* are not merely anomalies, they pre-date *Travelers*. There is no longer even an argument for following them down a misguided path.[6]

It must be reiterated that the New Jersey Bond Act does not confer any special rights or preferable treatment on ERISA funds. The Bond Act was enacted decades before ERISA and applies equally as well to a wide variety of suppliers of a contractor on a public job. The Bond Act reflects and arises from the historic state regulation of public work projects. This history, and the intent of the Bond Act, is wholly independent of and unrelated to ERISA or

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5. *Carpenters Southern California Administrative Corp. v. D&L Camp Construction*, 738 F.2d 999 (9th Cir. 1984); *Carpenters Southern California Administrative Corp. v. Majestic Housing*, 743 F.2d 1341 (9th Cir. 1984).

6. The petitioner also argues that the Supreme Court of New Jersey erred by misreading *Ragan* and *Greenblatt*. Specifically, petitioner states that those two cases dealt only with common law actions against a surety, not a state bond act. That was, and is, a distinction without a difference. In *Ingersoll-Rand*, this court made it clear that ERISA preemption analysis applies equally as well to both state laws and state causes of action. Moreover, cases decided since *Ragan* and *Greenblatt* have adopted and applied their reasoning to bond act suits. *Blieler v. Christwood Contracting Co., Inc.*, 72 F.3d 13 (2d Cir. 1996); *Tratoros, supra*; *Carpenters Local 261, supra*.

an ERISA fund. As this Court has recognized, the states possess broad authority under their police powers to regulate the employment relationship so as to protect workers within the state. *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 756, 105 S. Ct. 2380, 2398, 85 L. Ed. 2d 728 (1985). The New Jersey Bond Act is nothing more than this state's proper exercise of its traditional and historic police powers in a manner of general applicability, remote from ERISA's shores.

CONCLUSION

For the reasons set forth above, *amici curiae* respectfully requests that this Court deny the Petition for a Writ of Certiorari to the Supreme Court of New Jersey.

Respectfully submitted,

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